STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
SAWYER, P.J., and JANSEN and GAGE, J.J.
OAKLAND CIRCUIT COURT, HON. ALICE L. GILBERT, Presiding

EILEEN V. GRAVES,

Plaintiff-Appellant,

vs.

STEVE A. DIAZ, AMERICAN ACCEPTANCE MORTGAGE CORPORATION and BOLDER ESCROW, INC.,

Defendants-Appellees,

and

BOULDER ESCROW, INC., a Nevada corporation,

Counter and Cross-Plaintiff,

vs.

STEVE A. DIAZ and EILEEN V. GRAVES, jointly and severally,

Counter and Cross-Defendants.

/

Supreme Court Docket No. 119977

Michigan COA Docket No. 215141

Oakland County Circuit Court
Case No. 96-511648-CZ

BRIEF ON APPEAL - APPELLANT EILEEN V. GRAVES
ORAL ARGUMENT REQUESTED

March 24, 2003

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STATEMENT REGARDING BASIS OF JURISDICTION AND RELIEF SOUGHT

This Court possesses jurisdiction of this matter pursuant to MCR 7.302(F)(1) and its Order of January 28, 2003 granting Plaintiff-Appellant Graves' Application for Leave to Appeal and vacating its prior Opinion of October 22, 2002 (**App.**). The Court of Appeals reversed the trial court's grant of Graves' Motion for Summary Disposition and denial of Defendants-Appellees' Motion for Summary Disposition. (Graves v American Acceptance Mortgage Corp. *et al.*, 246 Mich App. 1, 630 NW2d 383 (2001) (Docket No. 215141) (**App.**). Graves' Motion for Rehearing was denied by the Court of Appeals on July 10, 2001 (**App.**).

The Court of Appeals erred in reversing the trial court's decision. The Court of Appeals found that when a purchaser under a land contract obtains a mortgage and uses the proceeds to pay off the balance of the land contract, the mortgage is given the status of a purchase money mortgage taking priority over all other interests, even those recorded prior to the mortgage. As more fully set forth in the Argument section of this Brief, the Court of Appeals' Opinion runs contrary to the clear language of the recording statutes (MCL §565.25, MSA §26.543; MCL §565.29, MSA §26.547) and the common usage of land contracts in Michigan.

Plaintiff-Appellant Graves duly recorded a valid judgment lien against property owned under a land contract by her ex-husband, Steve Diaz, to secure payments awarded under a divorce judgment. Her ex-husband subsequently entered into a mortgage agreement and used the proceeds to pay off the land contract. The Court of Appeals deemed this to be a "purchase money mortgage" superior to Graves' prior recorded lien. By failing to adhere to the plain language of the pertinent recording statutes in Michigan and to recognize the priority of a lien on a land contract vendee interest, however, the Court of Appeals effectively wiped out Graves' valid claim, thus causing substantial injustice to Graves.

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STANDARD OF REVIEW

A Motion for Summary Disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the claim or defense. This Court's review of the trial court's summary disposition ruling is *de novo*. Maiden v Rozwood, 461 Mich 109, 118, 597 NW2d 817 (1999).

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STATEMENT OF QUESTIONS PRESENTED

A. DID THE COURT OF APPEALS ERR IN GIVING PRIORITY TO A MORTGAGE, THE PROCEEDS OF WHICH WERE USED TO PAY OFF THE BALANCE OF A LAND CONTRACT, OVER A PRE-EXISTING, RECORDED LIEN?

Court of Appeals answered "No."

Plaintiff-Appellant answers "Yes."

Defendants-Appellees answer "No."

B. DID THE COURT OF APPEALS ERR IN FAILING TO RECOGNIZE THAT A LAND CONTRACT VENDEE'S INTEREST IS A PRESENT INTEREST IN REAL ESTATE, SUBJECT TO ATTACHMENT BY A JUDGMENT LIEN HOLDER?

Court of Appeals answered "No."

Plaintiff-Appellant answers "Yes."

Defendants-Appellees answer "No."

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CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On August 25, 1987, Plaintiff-Appellant EILEEN V. GRAVES ("Graves") and her then husband, Steve Diaz ("Diaz"), executed a land contract (the "Land Contract") to purchase the real property at issue, commonly described as 72 West End, Waterford, Michigan (the "Property"). (The Land Contract is attached hereto as **Exhibit "A."**) The sellers of the Property were John and Paula Giordano (collectively, the "Giordanos").

Graves and Diaz were divorced in 1994. The Judgment of Divorce dated June 9, 1994, awarded the Property to Diaz, but simultaneously granted Graves a lien on the Property to secure money awarded to her in the divorce for child support payments and monies owed from another property. The Judgment of Divorce ordered the following relative to the Property:

> The real property located at 72 West End, Waterford, Michigan, shall be awarded to the Plaintiff [Diaz] subject to a lien in favor of the Defendant [Graves] in the amount of seven (7%) percent interest per annum payable within one year from March 30, 1994 for the following debts which Plaintiff owes to the Defendant: (1) Any child support arrearages; (2) Rental arrearages in the amount of $900.00 relative to the property located at 1048 LaSalle, Waterford, Michigan; (3) Any arrearages owed on the land contract relative to 1048 LaSalle, Waterford, Michigan, as of March 31, 1994. These arrearages amount to $7,504.00. That the Plaintiff shall assume any outstanding obligation thereon and hold the Defendant harmless therefrom. (Emphasis added.)

(The Judgment of Divorce is attached as **Exhibit "B."**)

Graves recorded her lien at 8:54 a.m. on September 7, 1994 (*See*, Exhibit "B.") Later on September 7, 1994, Diaz entered into a mortgage with Defendant-Appellee American Acceptance Mortgage Corporation ("American Acceptance") to secure a loan to pay off the Land Contract (the "Diaz Mortgage", attached hereto as **Exhibit "C"**). Diaz used the mortgage proceeds to pay off the remaining amount due under the Land Contract with the Giordanos. A Warranty Deed was given to Diaz transferring the Property. American Acceptance recorded the

Diaz Mortgage on October 5, 1994 (Exhibit "C") and assigned the Diaz Mortgage to Defendant-Appellee Boulder Escrow, Inc. ("Boulder"), who recorded the Assignment on April 13, 1995.

Diaz failed to make payments for child support or remedy the arrearages as ordered under the Judgment of Divorce. Graves filed a motion to enforce her judgment lien and, on November 25, 1995, obtained from the trial court an Order to Enforce Judgment by Foreclosure and Other Remedies against Diaz (**Exhibit "D"**).

On January 12, 1996, Graves filed a Complaint against Diaz, American Acceptance and Boulder to foreclose on her judgment lien. On July 17, 1996, Boulder filed a cross-claim against Diaz for defaulting on his mortgage payments and a counter-claim against Graves claiming its mortgage interest had priority over Graves' judgment lien. Graves and American Acceptance and Boulder then filed cross-Motions for Summary Disposition.

In ruling on the opposing Motions for Summary Disposition, the trial court found that Graves' judgment lien had priority over the interests of American Acceptance and Boulder and granted Graves' Motion for Summary Disposition while denying that of American Acceptance and Boulder (**App.**). American Acceptance and Boulder appealed the trial court's ruling to the Court of Appeals. The Court of Appeals reversed the decision of the trial court (**App.**). Graves's Motion for Rehearing was summarily denied by the Court of Appeals on July 10, 2001 (**App.**). Graves' Application for Leave to Appeal was granted on January 28, 2003 after this Court vacated its prior Opinion of October 22, 2002 which summarily reversed the decision of the Court of Appeals (**App.**).

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ARGUMENT

I. THE COURT OF APPEALS ERRED IN GIVING PRIORITY TO A MORTGAGE, THE PROCEEDS OF WHICH WERE USED TO PAY OFF THE BALANCE OF A LAND CONTRACT, OVER A PRE-EXISTING RECORDED LIEN.

A. The Michigan Recording Statutes Give Priority to Graves' Lien.

The Court of Appeals erred in giving the Diaz Mortgage used to pay off the Land Contract priority over Graves' pre-existing, recorded judgment lien on Diaz's interest in the Land Contract. As the Court of Appeals recognized in its decision, the general rule under Michigan's "race notice" recording statute, being MCL §565.29, *et seq.*, MSA 26.547, *et seq.*, is that the first to record an interest in real property has priority over subsequently recorded liens or interests in the property. It provides in pertinent part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

Additionally, at the time Graves recorded her lien, MCL §565.25, MSA 26.543 stated that, once an instrument has been perfected (*i.e.,* properly recorded), "in the office of the register of deeds... all subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests."[1]

The Court in First of America Bank v Alt, 848 FSupp 1343, 1347 (DC Mich 1993) aptly described Michigan's recording statutes:

> In Michigan, interests in real property are recorded with the register of deeds in the county where the property is located. All recorded liens, rights, and interests in property take priority over

---

[1] MCL 565.25 was amended in 1996 and took effect on March 31, 1997. Graves' lien was recorded on September 7, 1994. It is the general rule in Michigan that all statutes are prospective in their operation except when clearly indicated to the contrary by the statute itself. Gormley v General Motors Corp., 125 Mich App. 781, 788; 336 NW2d 873 (1983).

> subsequent owners and encumbrancers. MCL 565.25; MSA 26.543. Where an individual fails to record a lien or interest in the property, that interest is void as against any subsequent interest holder who purchased the interest in good faith for valuable consideration. MCL 565.29; MSA 26.547. A person takes in 'good faith' if he or she takes without notice of the prior unrecorded interest. . . Thus, Michigan has adopted what is frequently known as a 'race - notice' statute: The first interest holder to record takes priority, unless that individual has notice of a prior unrecorded interest.

Id. at 1347 (Citations omitted).

In the instant case, it is undisputed that Graves was granted a valid lien which was duly recorded in the Oakland County Register of Deeds in 1994, prior to the recording (or even the granting) of the Diaz Mortgage. Accordingly, under the plain language of Michigan's race-notice recording statutes Graves' lien has priority over the Diaz Mortgage.

B. Michigan's Recording Statutes Do Not Grant Special Priority to Purchase Money Mortgages.

The recording statutes in the State of Michigan fail to provide a super priority or special consideration to purchase money mortgages relative to other prior recorded instruments. MCL 565.25, MSA 26.543; MCL 565.29, MSA 26.547. The statutory language is clear and unambiguous on its face and does not require or allow any interpretive analysis. Massey v Mandell, 462 Mich 375, 379-380; 614 NW2d 70 (2000). Accordingly, to the extent Defendants-Appellees argue that purchase money mortgages should be entitled to special statutory consideration relative to prior recorded instruments, these arguments are more properly directed to the legislature and not the judiciary.

The Michigan recording acts are not only clear and unambiguous, but make no mention whatsoever of "purchase money mortgage" priority. There is no reason to create any such priority here. In this instance, the property was "purchased" at the time of the closing on the Land Contract. The land contract was executed simultaneously with the closing and serves as the

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financing vehicle in much the same way as a mortgage granted to the seller (i.e., seller financed) would serve. The principal advantage for the seller utilizing the land contract instead of a mortgage is that the seller/vendor can provide for a relatively short window for establishing a default, can utilize the summary proceedings provisions in the Michigan Court Rules allowing a vendor to forfeit the vendee's interest, and until one-half of the contract is paid, the redemption period in the event of such a forfeiture is only 90 days (not six months as in the case of a mortgage foreclosure). *See*, MCR 4.201, 4.202; MCL §600.5744(3). Thus, the legislature has provided incentives for a seller to make use of the land contract financing vehicle instead of a mortgage financing vehicle. In all other practical respects, seller financing via land contract is essentially identical to seller financing via mortgage.

There is no dispute that if, upon initial purchase from the Giordanos, the Property had been financed utilizing a mortgage, it would clearly have priority over a mortgage subsequently utilized to pay off the first mortgage. Defendants/Appellees apparently argue that this result is because in the mortgage financing situation, "legal title" has already passed, whereas in the land contract situation, only "equitable title" passes. This argument, however, flies in the face of common sense and common practice in Michigan. Although legal title does not technically pass when the land contract is signed, the purchase/sale is, in fact, consummated and equitable title passes. As discussed below, upon such sale, the vendee has an interest in the real estate and thus has the ability to lien and encumber the Property.

Further, it is impractical, and even impossible, for a lien claimant on a vendee interest to know whether the vendor might in the future pay off the land contract utilizing a mortgage. Thus, every time a lien is filed on a land contract vendee interest (including, for example, the lien of a mortgage recorded pursuant to the Land Contract Mortgage Act (MCL §565.357; MSA 26.677), see more detailed discussion below) the lender or lienor would be taking its interest subject to the

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possible loss of priority for which it could never obtain title insurance. Since title insurance would only cover encumbrances existing at the time of the effective coverage date (which would never be later than the date of issuance of the policy), the title insurer would always exclude from coverage a subsequently recorded mortgage whose proceeds are used to pay off the land contract.

By contrast, a lender who wishes to provide mortgage financing for the pay off of a land contract has the ability to review the title records of the register of deeds so that it may determine if there are any such pre-existing encumbrances and then purchase title insurance against those risks. Under the ruling of the Court of Appeals, any title insurance company providing a policy to protect a first lien of a vendee mortgage or any other lien (such as a judgment lien, in this case) would do so at its peril knowing of the possibility that the lien will lose its first priority position at the moment a subsequent lender provides mortgage proceeds to pay off the land contract.

In the instant case, there is no dispute that, at the time the Diaz Mortgage was executed, Graves' judgment lien was already of record (*i.e.*, properly perfected). Thus, the only remaining issue is whether there are sufficiently compelling circumstances to justify an exception to the race notice statute. There are none.

C. Priority of Purchase Money Mortgages Does Not Apply in Context of the Pay-Off of a Land Contract.

Defendants-Appellees' argument is that the nature of the interest acquired in a land contract purchase precludes the lien filed by Graves from taking priority over a subsequent "purchase money mortgage." This argument not only misconstrues the practical usage and understanding of land contracts in Michigan, but would create havoc with the application of the statutes allowing for mortgages to be granted against property purchased pursuant to a land contract. Michigan law recognizes that a contract for the sale of land operates as an equitable conversion, wherein a vendee's interest under a land contract becomes realty. Charter Twp. of

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Pittsfield v City of Saline, 103 Mich App 99, 103; 302 NW2d 608 (1981) (citation omitted). As such, a land contract vendee does obtain a cognizable interest in the real property.

The priority given to purchase money mortgages does not apply in the case of a land contract pay off. Since the land was already "purchased" at the time the land contract was executed, a mortgage providing funds to pay off the land contract should not be accorded purchase money status. This not only follows as a matter of practical usage, but illustrates how the public policies cited by the Court of Appeals underlying the priority given to purchase money mortgages are inapplicable to the land contract payoff situation.

The first such public policy was described by reference to Slodov v U.S., 436 US 238, 258, n.23; 98 S Ct 1778; 56 L Ed 2d 251 (1978). This case describes the proposition that a purchase money mortgage has priority because "it merely reflects [the lender's] contribution to the taxpayer's estate and therefore does not prejudice creditors who are prior in time." *Id.* Outside the context of land contracts, this proposition helps explain a purchase money lender's priority since, without the purchase money mortgage, the taxpayer's interest in the real estate would not have been created at all.

In the context of a land contract, however, the vendee interest would already be in the taxpayer's estate when the creditor's claim (in the case at bar, that of Graves as a judgment lienor) attaches. Such creditor's claim is clearly prejudiced if it is automatically subordinated to the party subsequently paying off the land contract. This prejudice arises because the vendee interest is a cognizable interest in real property when the lien attaches. Thus, the Court of Appeals' reliance on the public policy supporting the purchase money mortgage status referred to in Slodov was misplaced in the context of a land contract.

The other public policy underlying the priority of purchase money mortgages noted by the Court of Appeals is also inapplicable in the context of land contracts. Citing the *Restatement*

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Property Mortgages 3d, Section 7.2, Comment b, page 459, the Court of Appeals relied on the notion that providing priority to lenders encourages such lenders to facilitate the purchase of property. Again, outside the context of land contracts, this public policy is understandable since lenders have no need to worry about pre-existing liens and other encumbrances, thus facilitating their willingness to make the loan transaction.

With a land contract, however, giving priority to the lender financing the pay off of the land contract does not very well encourage the purchase of property since the property was already purchased at the time the land contract was first executed. The land contract pay off is effectively a refinance of the original seller financing and the above-described public policy simply has no application.

With respect to statutory priorities, there is no practical or public policy reason which justifies the treatment of the pay off of a land contract any differently than Michigan law treats the re-financing of a mortgage utilized to purchase property in the first instance. The following example illustrates the point:

> Assume: Purchaser buys real property for fair market value. Purchaser makes a down payment in cash and finances the balance with a mortgage loan and records the mortgage. Later, a judgment lien claimant records a lien on the property. Purchaser then defaults on the mortgage and, just before the foreclosure, a third party lender refinances the original mortgage unaware of the judgment lien.

Under the foregoing circumstances, Michigan's race notice provisions clearly provide that the judgment lien, having been recorded earlier in time, would have priority over the subsequently recorded mortgage - even though the judgment lien was, in the first instance, subordinate to the pre-existing (purchase money) mortgage. Thus, in the ordinary course, the judgment lien is paid off with proceeds from the re-financing, discharging the lien and providing priority status to the refinancing lender.

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Furthermore, the practical mechanics of this hypothetical transaction work within the statutory scheme. Since the third-party lender knows that the property is not being purchased for the first time, it also knows of the possibility that other liens and encumbrances could have attached to the borrower's interest in the property since the time of the original purchase. Moreover, the third-party lender has constructive knowledge of what is in the public record. MCL §565.25; MSA §26.543; Boraks v Siegel, 366 Mich 308, 311; 115 NW2d 126 (1962) (applying CL 1948 §565.25, predecessor of MCL §565.25). Mortgage lenders routinely purchase title insurance to protect themselves against the risk of a pre-existing lien existing in the public record, but not discovered in a search. For assuming this risk, the title insurance company earns a premium. Thus, all parties are protected and the integrity of the race notice statutory scheme is maintained.

The facts presented in the instant case are virtually identical to the example given above. The land contract vendors (the Giordanos) stand in the place of the original purchase money lender. This makes sense since selling on land contract is widely understood to be a seller financing arrangement. As the Michigan Court of Appeals has explained:

> There is, of course, no functional difference between a purchase money mortgage and a land contract. Both secure payment of unpaid purchase money; until it is fully paid the purchaser's rights are encumbered by a lien in favor of the unpaid seller. Yet for largely historical reasons the law of mortgages and land contracts has developed in separate compartments.

Rothenberg v Follman, 19 Mich App 383, 387 fn 4; 172 NW2d 845 (1969), citing Turner, *The Equity of Redemption* (1931).

Instead of taking back a mortgage, a land contract seller retains the "legal title" as security for its agreement to finance the sale.

Here, Graves obtained and recorded her lien against Diaz's vendee interest in the Property. Instead of such lien being subject to the initial mortgage in the above example, the lien here was

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subject to the vendor's right to foreclose (or forfeit) if the payments were not made. The Defendants-Appellees in the instant case which financed the land contract pay off are the third-party lender in the above example. They are charged with constructive notice of Graves' lien since it was recorded prior to their mortgage. And, since Defendants-Appellees knew that this was a land contract pay off and not a sale, they knew of the possibility that intervening liens could have attached to the Property, *i.e.*, the vendee's interest. In order to protect themselves from this eventuality, they had the ability to, and actually did, obtain title insurance. The result should be the same as what Michigan law already mandates as the result in the example above, *i.e.*, the lien remains superior to the pay off financing mortgage.

D. The Court of Appeals Opinion Undermines the Michigan Land Contract Mortgage Act.

Treating the mortgage pay off of a land contract differently than the refinancing of a purchase money mortgage will have disastrous consequences. Under the Court of Appeals ruling, the long standing practice of lending against land contract interests would cease since financial institutions could never be assured of retaining their first priority position. Any subsequent mortgage pay off of the land contract interest would immediately step ahead with a first lien. In fact, current land contract mortgages are already at risk of losing their priority status under the present ruling of the Court of Appeals. Moreover, under these circumstances, title companies most likely could not and would not insure against the loss of priority.

The Court of Appeals ruling effectively undermines the relatively recent legislative enactment set forth in MCL §565.356, *et. seq.*; MSA §26.676, *et seq.*, the Land Contract Mortgage Act. The act provides in pertinent part:

> (1) A vendor or a vendee under a land contract may grant a land contract mortgage to secure any debt or obligation that may be secured by a real estate mortgage. This subsection does not alter

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the effect of any contractual provisions which prohibit or result in a default upon the mortgage, sale, assignment, or further encumbrance of a vendor's or vendee's interest in a land contract which would otherwise be enforceable.

(2) For the purposes of sections 6 to 11 [MCL 565.356-565.361], the respective interests of a vendor or a vendee subject to a land contract mortgage includes all of the respective rights of a vendor or vendee including, without limitation, the vendor's rights to payments and the vendee's rights to conveyance. For the purposes of sections 6 to 11, the interests of vendors and vendees subject to a land contract mortgage are real property interests.

(3) Unless otherwise provided by the parties, a land contract mortgage encumbers all of the vendor's or vendee's interests that are mortgaged, whether real, personal, or mixed, in the same manner and to the same extent as a real estate mortgage.

MCL §565.357, MSA §26.677 (emphasis added).

Thus, in this act, the legislature recognized that lenders have long been providing mortgage loans using land contract interests as collateral, but without a set of guidelines governing the issues relating to such mortgages (procedures for foreclosure, for example, are covered elsewhere in the act, *see, e.g.*, MCL §565.359, MSA §26.679; *see also, House Legislative Analysis Section analysis of House Bill 5282, dated August 11, 1998* (**Exhibit "E"**)). The legislature thus enacted statutorily what had only been a matter of common law prior thereto, and provided a set of guidelines for how these mortgages should be treated. The Court of Appeals decision essentially eviscerates the statute by making land contract mortgage lending virtually impossible. A lender fully complying with the statute in granting a mortgage loan would in all cases be subjecting the lien of its mortgage to the subsequent lien of the land contract pay-off lender. Since there would be no title insurance available to protect the first land contract mortgage lender against the risk of a subsequent loss of priority, the loan would never be made.

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The Land Contract Mortgage Act is thus completely subverted by the Court of Appeals' creation of a priority interest under such circumstances.[2]

It is not only lenders who are adversely affected by the Court of Appeals ruling. Contractors who lien land contract interests under the Construction Lien Act, being MCL §570.1101, *et seq.*, MSA §26.316(101), *et seq.*, risk losing priority. Federal taxing authorities who have liened assets of taxpayers, including vendee's interests, also lose priority as the Court of Appeals specifically noted in its decision. *See*, footnote 7, at p. 4 of the Court of Appeals Opinion (**App.**). Thus, while the Court of Appeals decision works a substantial injustice to Graves as a perfected judgment lien claimant, it will have a similar adverse effect on a wide array of mortgage and lien claimants who rely on the race notice recording acts and the Land Contract Mortgage Act in conducting their business.

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT A LAND CONTRACT VENDEE'S INTEREST IS A PRESENT INTEREST IN REAL ESTATE, SUBJECT TO ATTACHMENT BY JUDGMENT LIEN HOLDERS.

A. The Court of Appeals Unduly Relied Upon Fecteau v Fries.

Plaintiff-Appellant respectfully submits that the Court of Appeals decision is simply not based on a well-reasoned analysis. The entire holding appears to stand on the somewhat arbitrary distinction (in this context) between the vendee holding "equitable" versus "legal" title. The Court, of course, is technically accurate as a matter of law in that "legal" title does not transfer until the balance of the land contract is paid off and the deed is conveyed. Gilford v Watkins, 342 Mich 632; 70 NW2d 695 (1955); *See*, generally, 1 John G. Cameron, Jr., *Michigan Real Property*

[2]It is significant to note that the land contract mortgage legislation was supported by the Real Property Law Section of the State Bar Association of Michigan, the Michigan Bankers Association and the National Bank of Detroit (**Exhibit "E"**).

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Law, Sec. 16.1, *et. seq.* (2d Ed. 1995). However, in the context of the Court of Appeals ruling, this wrongly assumes that, until legal title is conveyed, the vendee does not have a present interest in the real property upon which creditors can rely and fails to consider the long standing practice concerning the use of land contracts as collateral as evidenced by the Land Contract Mortgage Act.

Upon execution of a land contract, the vendee immediately acquires an interest in real estate, albeit an equitable interest, which can be mortgaged or conveyed subject to valid restrictions in the parties' agreement. Cameron, *supra*, Sec. 16.4. Michigan courts have long noted the power of a vendee to encumber his or her land contract interest:

> In equity, the land belongs to the vendee, and may be sold, devised, or encumbered by him, and on his death will descend to his heirs [citation omitted]. It must be taken, however, subject to the rights of the vendor under the contract.

Bowen v Lansing, 129 Mich 117, 119; 88 NW 384 (1901).

The Court of Appeals' reliance on this Court's decision in Fecteau v Fries, 253 Mich 51; 234 NW 113 (1931), was misplaced. The Court cited Fecteau for the proposition that a mortgage, the proceeds of which fund the purchase of real estate, has priority over earlier creditors' interests, even if those earlier interests were duly recorded. The Court of Appeals, quoting Fecteau, concluded that because legal title did not transfer until the time that the mortgage paying off the land contract was executed, the "[p]laintiff's judgment lien 'could not insert itself between the deed to [Diaz] and the purchase-money mortgage by [Diaz] to [American Acceptance].'" (P. 5 of the Court of Appeals Opinion (**App.**). Fecteau, however, was not decided in the context of a land contract. This significant distinction makes the case entirely inapposite.

In Fecteau, money was borrowed for an initial deposit under the terms of a purchase agreement for real property. When the money was loaned, a mortgage on the property was

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granted by the purchaser/borrower. At that point, the purchaser/borrower owned no interest in the property. All he then owned was the right to purchase under the terms of the purchase agreement. When the transaction closed, the purchaser borrowed additional funds to pay the balance of the purchase price, again secured by a mortgage. This second-in-time mortgage provided the funds to close the sale and the conveyance of a deed from seller to purchaser. Accordingly, that mortgage was deemed a "purchase money mortgage".

The Fecteau Court accurately pointed out that a pre-existing creditor could not intervene between the granting of title and the attachment of the purchase money mortgage. *Id.* at 53. The Court could properly conclude that when the initial mortgage was recorded, the granting party was not vested with an interest in the property which could be subject to a lien. At the moment such interest was obtained, the purchase money mortgage was simultaneously granted and so the prior mortgage was squeezed into second position.

Unlike the present case, the Fecteau Court was able to ignore the effect of the statutory recording priorities as all the parties were a part of a single transaction with actual knowledge of the encumbrances. Furthermore, there was no need in that case to set out the distinction between equitable and legal title, which only arises in the context of a land contract, a distinction central to Plaintiff/Appellant's position. Thus, the Court's reliance on Fecteau is misplaced because it fails to recognize that the equitable interest created at the time of the land contract purchase is a present interest in real property and subject to attachment. The Court of Appeals arbitrarily and improvidently reads "title" to mean "legal title" only, thus giving no significance to the vendee's interest in the real estate, *i.e.,* its equitable title. The Fecteau decision gave priority to the "purchase money mortgage" not because of an elevated priority status, but because of its

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conclusion that encumbrances granted by a party not yet seized of any interest in the property must yield to the mortgage that attaches at the moment an interest is created.

In the case at bar, the vendee [Diaz] had an actual interest in the real estate when the Property was purchased in 1987, which interest still existed at the time of granting Graves' judgment lien. Thus, the reasoning in Fecteau does not come into play. Although the words "legal title" are used in Fecteau and elsewhere, none of these cases deal with a land contract situation in which equitable title is, in fact, conveyed at the time of the signing of the land contract. (This is commonly demonstrated by the fact that when a land contract is executed, there is an actual closing on the transaction unlike the mere signing of a purchase agreement.) Defendants/Appellees' attempt to capitalize on the use of the term "legal title" (as distinct from "equitable title") based on decisions like Fecteau where land contracts were not involved must be rejected.

Similarly, the Court of Appeals' reliance on the Restatement of Property, *supra*, is also misplaced. The Restatement sets forth the definition of a purchase money mortgage and a myriad of examples where a purchase money mortgage is given priority over liens and other encumbrances. Its reasoning, too, refers only to "title" without recognizing or making the distinction between equitable and legal title. Like Fecteau, it is not discussed in the context of paying off a land contract. However, the important feature of a land contract in Michigan is the fact that the vendee's "equitable title" is considered an interest in real estate and, an interest that can be, and often is, given as security to third parties. It is this distinction that is critical.

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B. The Court of Appeals Wrongly Relied on Foreign Jurisdictions Which Do Not Recognize a Land Contract Vendee's Present Interest in Real Estate.

The Court of Appeals' reliance upon two out of state decisions, Wermes v McCowen, 286 IllApp 381; 3 NE2d 720 (1936) (**Exhibit "F"**) and Liberty Parts Warehouse, Inc. v Marshall Co. Bank and Trust, 459 NE2d 738 (Ind App 1984) (**Exhibit "G"**), was unwarranted. Those decisions failed to recognize the present existing interest in real estate held by a land contract vendee, are inconsistent with Michigan's race notice recording statutes, and undermine the Michigan Land Contract Mortgage Act.

If looking to foreign courts, the Court of Appeals should have turned to the New Mexico Supreme Court in C&L Lumber and Supply, Inc. v Texas American Bank/Galeria, 110 NM 291; 795 P2d 502 (1990) (**Exhibit "H"**). This decision is squarely on point and accords land contract status similar to both the law and common practice in Michigan. In C&L, the plaintiff, C&L Lumber, a material supplier, obtained a materialman's lien in connection with a construction project undertaken by the land contract vendee. Following the recording of the materialman's lien, the vendee obtained mortgage financing from defendant Texas American Bank/Galeria using the proceeds to pay off the land contract. Texas American argued that its mortgage should be accorded purchase money mortgage status and take priority over plaintiff's prior materialman's lien, pointing to the Liberty Parts, *supra*, decision of the Indiana Court of Appeals. In rejecting the conclusions of Liberty Parts, the New Mexico Supreme Court ruled:

> In addition to "superior equities," the basis usually given for the priority of a purchase-money mortgage, as recognized by *Liberty Parts*, is that "there is no moment at which the judgment lien can attach to the property before the mortgage of one who advances purchase money." *Id.* at 739. In New Mexico, the purchaser's equitable estate under a land sales contract is an estate in property. [Citations omitted.] He is treated as the owner and his interest in the property is subject to a judgment lien. [Citations omitted.]

> Thus, various liens in fact may attach themselves to property under a land sales contract prior to the execution of a refinancing loan and mortgage. To hold that such a refinancing mortgage was a purchase-money mortgage, entitled to priority over all other liens, would ignore both the earlier attachment of these liens and the possible inequity in subordinating them to the refinancing agreement. We conclude that under New Mexico law a mortgage executed for the purpose of paying off a land sales contract is itself not a purchase-money mortgage. (Emphasis added.)

C&L Lumber, 795 P2d 506, 507.

As in New Mexico, the purchaser's equitable estate under a land contract in Michigan is an estate in property. Accordingly, liens may attach themselves to a vendee's interest in a land contract and are entitled to priority over a subsequently obtained mortgage paying off the land contract. *See* also, Lorenz Co. v Gray, 136 Or 605; 298 P 222 (1931) (mortgage used to pay off a land contract would not have priority over a previously recorded mechanic's lien on the vendee's equitable interest) (**Exhibit "I"**)).

The Court of Appeals' reasons for failing to adopt the analysis of C&L and Lorenz were ill-advised. The Court of Appeals asserted in footnote 11 on page 8 of its Opinion that "the New Mexico and Oregon courts failed to (1) recognize the significant fact that only through the involved mortgages did the land contract vendees obtain legal title to the involved properties, and (2) appropriately consider or weigh in their decisions the public policies behind affording purchase money mortgages priority over the earlier lien holder's interests" (**App.**). Neither of these reasons hold up under scrutiny. First, the fact that legal title did not transfer at the time of the purchase is not an appropriate consideration in determining whether a prior lien could attach to a land contract vendee's interest. As noted above, a present interest in the estate exists in the vendee when the land contract is executed and is, therefore, subject to attachment. Prejudice therefore can arise each time a pre-existing lien claimant is subordinated to the mortgage paying

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off a land contract. Further, as already noted in Section I of this Argument, the public policies underlying purchase money mortgages do not apply at the time of the pay off of a land contract.

III. DEFENDANTS-APPELLEES ARE NOT ENTITLED TO THE REMEDY OF EQUITABLE SUBROGATION.

Defendants-Appellees are not entitled to enjoy the remedy of equitable subrogation under these circumstances as the trial court determined when it granted Graves' Motion for Summary Disposition and denied that of Defendants-Appellees. In this case, Defendants-Appellees are commercial lending institutions in the business of making loans for profit. Each voluntarily chose to make a loan of money secured by a mortgage on the Property. The record below makes clear that the Defendants-Appellees have no other interest in engaging in such a transaction other than to acquire financial gain. In discussing the doctrine of equitable subrogation under Michigan law in the context of a bank which voluntarily engages in a financial transaction seeking to make a profit, the U.S. Bankruptcy Court for the Western District of Michigan has noted that Michigan law prohibits such an entity from invoking the doctrine of equitable subrogation:

> Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is used only in extreme cases bordering on, if not reaching the level of fraud. Under Michigan law it is well established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a mere volunteer.

Boyd v Superior Bank FSB (In re Lewis), 270 Br 215, 217 (WD Mich 2001) (citations omitted); *see also,* Hartford Accident and Indemnity Co. v Used Car Factory, Inc., 461 Mich 210; 600 NW2d 630 (1999); Citizens Insurance Co. v Buck, 216 Mich App 217, 226, 548 NW2d 680 (1996) (the doctrine only applies when one paying off the debt was forced to pay that debt because they were secondarily liable).

Since there can be no genuine dispute that Defendants-Appellees are, in fact, mere volunteers in having decided to make the loan to Diaz, they are not entitled to equitable subrogation.

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Weighing the relevant equities in this situation yields the same result. On the one hand, the lending institutions voluntarily made a loan to Diaz and took a mortgage on the Property as collateral. Prior to making the loan, the lenders had the ability to check the public record to determine if there were any pre-existing liens which, under Michigan's race notice recording statute, would have a senior position. The lender can (and routinely does) even purchase insurance from a title insurance company to insure itself against the risk that its search of the public record failed to disclose a pre-existing recorded lien on the property. On the other hand, the lien claimant (Graves) who first records the lien in the Register of Deeds must rely on the integrity of the recording statutes to establish and preserve her lien position. Under Defendants-Appellees' application of the doctrine of equitable subrogation in this context, the lien claimant's priority suffers immediate prejudice where a land contract pay off mortgage lender is given carte blanche to turn the lien claimant's interest into a junior lien. Equity could hardly dictate that a senior lien claimant should be punished because a subsequent mortgage lender failed to make a proper search of the public record and/or obtain title insurance in order to assure its priority status. Graves did what she was supposed to do in perfecting her lien claim and the Defendants-Appellees did not take the appropriate steps that were available to protect themselves. Clearly, the equities should not run to the party failing to meet its responsibilities.

Although unavailing to the trial court, Defendants-Appellees have continued to suggest that a proper equitable analysis should include an evaluation of how much equity there was in the Property at the time the Land Contract was paid off. This is nothing more than a red herring designed to distract the Court from the realities of mortgage lending practice in Michigan, and the statutory race notice recording scheme upon which it relies. Defendants-Appellees' argument that when the lender came in to pay off the land contract, it was providing all of the "equity

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money" and is thus entitled to the first position that the land contract vendor had is not only an inappropriate analysis, but would be the ruination of the way priorities are established in Michigan.

In effect, the lien priority of every lien claimant (whether on a land contract vendee interest or whenever there is a pre-existing mortgage) under Defendants-Appellees' argument would be subject to the risk of losing its priority whenever the value of the property declines markedly. Such an absurd result can be illustrated by the following hypothetical. Assume a property is initially purchased with mortgage financing (the example applies equally if the initial financing is via land contract, as in this case). Assume further that the lender has a first lien priority position and a title insurance policy insuring same. Even if the lender loans only 70% of the value of the property, it might well still find itself under-secured if the value of the property declines by more than 30% early in the life of the loan. This is precisely the risk that a mortgage lender (or land contract vendor) takes when making the loan. If the lender is forced to foreclose, it can only look to the collateral's then-existing value and must seek the balance in a deficiency claim against the borrower, if at all. A subsequent lien claimant on the same property takes similar risks. It knows that as a matter of priority, the first mortgage (or vendor, as in this case) must be paid off before it can assume a first lien position. If the value of the property declines such that the total amount owing to the initial mortgage lender plus the lien claim exceeds the value of the property, then on foreclosure the lien claim would be subject to a deficiency. This is the risk the lien claimant takes when filing a lien. Neither the original mortgage lender nor the subsequent lien claimant, however, expects to take the risk that in the event insufficient proceeds exist to pay off their respective claims, that a subsequently recorded interest would have priority

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over them. The parties must be able to rely on the race notice priority rules in the Michigan recording statutes in evaluating and underwriting lending risks.

When a new lender is asked to provide refinancing, it is in the same position as the original mortgage lender (or vendor) in that it can compare the then-existing value of the property to the pre-existing liens in evaluating whether to make the loan. Its underwriting assumes, however, that the lien of a subsequent lender will not take priority over its mortgage lien. It is this scheme that the Michigan priority statutes follow and which provide order and comfort for all lenders in the State of Michigan. These recording priority statutes in no way depend upon the appraised value of the property at the time the prior liens were granted or recorded, nor do they inquire into the value of the property at the time of a subsequent loan. The entire analysis of whether there was substantial, some or no equity in the Property at the time Graves obtained her lien or at the time Defendants-Appellees made the loan to Diaz simply has no place in an equitable subrogation analysis. Giving any credence to Defendants-Appellees' argument would undermine the priority statutes and throw loan underwriting practices into turmoil.

Defendants-Appellees must face the fact that they are sophisticated commercial institutions which made a mortgage loan with an incomplete title search and took their mortgage position subject to Graves' lien. Their remedy is title insurance, which they undoubtedly purchased. They are entitled to no super priority as a purchase money lender because their lending was to refinance the Property, not to purchase it. Furthermore, as commercial lenders, they can establish no equitable basis for obtaining a priority through the back door which was not available to them through the front.

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IV. DEFENDANTS-APPELLEES' ANTICIPATED ARGUMENTS RELATING TO THE FACT THAT THE LAND CONTRACT WAS NOT RECORDED ARE MATTERS FOR CONSIDERATION BY THE LEGISLATURE NOT THE JUDICIARY.

Defendants-Appellees' lament over the fact that the Land Contract was not recorded is misplaced.[3] While it is factually accurate that the Land Contract was not recorded, the "sky is falling" implications of such non-recording suggested by Defendants-Appellees have no bearing on the outcome of this case and, in any event, are unpersuasive.[4]

Graves' lien was recorded in the Oakland County Register of Deeds, which maintains both a tract index, organized by legal description, as well as a grantor/grantee index, organized alphabetically by name. Accordingly, by filing her lien in the Oakland County Register of Deeds, the lien was duly recorded perfecting her interest in the property and was readily ascertainable by reference to the legal description of the Property. While there may be counties in the State of Michigan which do not maintain a tract index, Oakland County does. Thus, even if there were theoretical merit in the claim that a title company could not discover the lien on an unrecorded land contract in the grantor/grantee index (which, as discussed below, there is none), a title company would have had no trouble discovering the lien in Oakland County's tract index. Thus,

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[3] Based upon the *amicus curiae* brief filed by the Michigan Land Title Association in connection with the Defendants-Appellees' Motion for Rehearing, it is anticipated that the MLTA will present similar arguments to the Court.

[4] As the Court is undoubtedly aware, in the real world of real estate transactions, instruments recorded close in time prior to a transaction can go undiscovered. This is the so-called "gap period" - the time between the completion of a title search and the closing on the transaction. The risks associated with "gap period" recordings are typically borne by title insurers who normally obtain title affidavits regarding the possibility of such recently recorded liens from the parties. Due to the fact that Graves' lien was properly recorded during this "gap period," Defendants-Appellees would be in the exact same position they are in now regardless of whether or not the land contract was ever recorded.

the issues raised with respect to whether the Land Contract was recorded (to the extent that such non-recording affects searches in the grant/grantee index) are of no moment to the disposition of this case.

Defendants-Appellees' claim that the lien recorded by Graves would not be discoverable in a grantor/grantee index is simply not true. When Graves recorded her lien, it was not only filed by property description in the tract index, it was filed in Oakland County's grantor/grantee index as well. Since the Land Contract was not recorded, the lien would not be ascertainable by simply searching under the name of the vendor (the Giordanos). It would, however, be readily ascertainable by simply searching under the names of either of the vendees, Diaz or Pretto n/k/a Graves.

Any suggestion that the names of the vendees were not well known to Defendants-Appellees defies all logic and common sense. Defendants-Appellees were paying off a land contract. Certainly, even a modestly prudent lender would obtain a copy of the land contract in connection therewith. Furthermore, the existence of the land contract, even if unrecorded, could never be hidden from the lender in any event. Every land contract pay off mortgage lender has to know (either actually or constructively) that the borrower does not, as of yet, have record title. The lender would have to then determine the basis for obtaining such title in order to be willing to grant the loan and would then by necessity be given access to the land contract. Since the lender knows or should know that encumbrances could have attached to the vendee's interest in the property, the obvious course of action is to search the title records under both vendor and

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vendee. This is especially true where it is also readily ascertainable that the land contract was not recorded. A search under the vendee would, in any jurisdiction, have revealed the Graves lien.[5]

The anticipated issues raised by Defendants-Appellees in this regard, have nothing at all to do with a title company's (or any other party's) ability to discover a pre-existing lien on the land contract vendee's interest. As noted above, the very land contract being paid off would disclose the name of the vendee under whose name the lien would appear in the grantor/grantee index. Instead, these arguments are at most only applicable to the esoteric (and perhaps even merely aesthetic) notion that the effect of recording a lien on an unrecorded land contract will effectively create a new chain of title under the name of a vendee. This has no legal import as the recording statutes require only that the lien be recorded, without any reference whatsoever to how those interests may appear and in which chain of title. Eileen Graves followed the law in perfecting her judgment lien by filing in the Oakland County Register of Deeds. Her filing complied with the recording statutes which then provided:

> [T]he record of such levies, attachments, . . . on record in the **office of the register of deeds**, shall be notice to all persons, of the liens, rights and interests acquired by or involved in such proceedings, and all subsequent owners or incumbrances shall take subject to such liens, rights or interests.

MCL 565.25 (emphasis added).

This lawsuit is neither the time nor the venue for attempting to amend the law of Michigan governing whether and when land contracts need to be recorded. The creation of land contracts is statutorily governed by the Land Contract Act, being MCL 565.351 *et seq.*, MSA 26.671, *et*

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[5] Common sense even dictates that the Judgment of Divorce containing Graves' lien rights against the Property was also easily ascertainable. Since the Land Contract revealed vendees Diaz and Graves (Pretto) as husband and wife, Defendants-Appellees must have sought evidence to establish that they were no longer married before granting a mortgage loan only to Diaz. Within this Judgment of Divorce, Graves' lien rights are plainly stated. All Defendants-Appellees needed to do was search under Diaz or Pretto (n/k/a Graves) to discover the recorded lien.

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seq. This statute sets forth the requirements for the effective preparation of a land contract. Nowhere in the statute does it provide that the land contract must be recorded for it to be effective. The summary proceedings act relating to land contracts, being MCL 600.5726, MSA 27A.5726 and MCR 4.202, provides for procedures to be followed in forfeiting a land contract upon a default. None of these procedures require that the land contract have been recorded.

The Land Contract Mortgage Act, MCL 565.356, *et seq.*, details procedures for properly perfecting a mortgage on a land contract vendee's interest. It also provides for procedures to foreclose on such a mortgage. MCL 565.359. Nowhere in this act does it provide that in order for the mortgage to be effective or to foreclose thereon the land contract must be recorded. Other statutory provisions authorize the recording of liens against interests in real property including land contract vendee interests. *See, e.g.,* the Construction Lien Act being MCL 570.1101, *et seq.* MSA 26.316(101). Nowhere in these statutes is it provided that the lien is not effective unless the land contract is recorded.

Despite this broad statutory authority, Defendants-Appellees now apparently seek to argue that Graves' lien should be deemed ineffective or otherwise lose its priority relative to the subsequently recorded mortgage because of the possibility that a title company searching the Register of Deeds records in a county in which a tract index is not maintained, might not bother to search under the name of the vendee in the context of a mortgage paying off a land contract. Such a result is absurd. Furthermore, accepting Defendants-Appellees' arguments would radically change a variety of well settled statutory provisions without any legislative analysis whatsoever. If there truly is merit in limiting the effectiveness of an unrecorded land contract or lien thereon, then such arguments should be presented to the Michigan legislature for due consideration. Given the fact that these arguments do not even apply in the instant case because

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of the existence of Oakland County's tract index, the judicial legislating sought by Defendants-Appellees is particularly inappropriate.

CONCLUSION

When Eileen Graves was granted and recorded her judgment lien, she had the right to believe that her lien actually attached to the Property, and would have priority over any subsequent lien or mortgage. This is what the recording statutes in Michigan plainly state. While the trial court reached this result, the Court of Appeals decision ignored the nature and reality of land contracts in Michigan, and gave priority to a subsequently recorded mortgage contrary to the race notice recording statutes. The Court of Appeals effectively wiped out Graves' only hope to secure her court ordered property settlement and child support. As described above, however, the Court of Appeals decision goes far beyond the clear injustice to Eileen Graves; it has created an untenable precedent with respect to the law and practice in Michigan regarding land contracts. Construction lien claimants, taxing authorities, and indeed banks and mortgage companies, who have long-standing practices of lending against land contract vendee interests, have been effectively told that the priority of their claim is now in doubt. This not only prejudices the rights of existing vendee lien claimants, but wreaks havoc with lenders' ability to grant land contract mortgages in the future, doing so in the face of specific statutory provisions authorizing and governing such mortgages. This Court should remedy this unjust and unfortunate result by reversing the decision of the Court of Appeals.

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RELIEF REQUESTED

Plaintiff-Appellant Eileen V. Graves respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and remand to the trial court for entry of judgment.

Respectfully submitted,

TAUBMAN, NADIS & GOROSH, P.C.

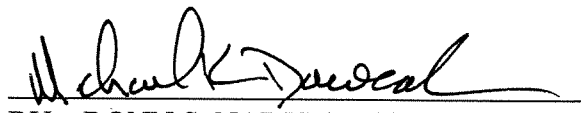

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EXHIBIT A
LAND CONTRACT

PHILIP R. SEAVER TITLE COMPANY, Inc.

FORM OF LAND CONTRACT

F556

This Contract, made this 25th day of AUGUST, 1987

Parties

between John A. Giordano and Paula Giordano, his wife

hereinafter referred to as "Seller", whose address is 7581 Olde Sturbridge Trail, Clarkston,MI

and Steve A. Diaz and Eileen V. Pretto, his wife

hereinafter referred to as "Purchaser", whose address is 40 West End Avenue, Pontiac, Michigan

Witnesseth:

1. **Seller Agrees:**

Description of Land

(a) To sell and convey to Purchaser land in the Township of Waterford, County of Oakland, Michigan, described as:

Lot 41, Leffel's Subdivision of part of the Northeast 1/4 of the Southeast 1/4 of Section 25, Waterford Township, Oakland County, Michigan, according to the plat thereof as recorded in Liber 39, Page 21 of Plats, Oakland County Records

a/k/a 72 West End Avenue, Pontiac, Michigan

, hereinafter referred to as "the land", together with all tenements, hereditaments, improvements, and appurtenances, including any lighting or plumbing fixtures, shades, Venetian blinds, curtain rods, storm windows, storm doors, screens, awnings, and now on the land, subject to any applicable building and use restrictions and to any easements affecting the land.

(b) That the full consideration for the sale of the land to Purchaser is:

Terms of Payment

($ 34,000.00) dollars, of which the sum of Three Thousand Four Hundred ($ 3,400.00) dollars has been paid to Seller prior to the delivery hereof, the receipt of which is hereby acknowledged, and the additional sum of Thirty Thousand Six Hundred ($ 30,600.00) dollars, is to be paid to Seller, with interest on any part thereof at any time unpaid at the rate of ten (10) per cent per annum while Purchaser is not in default, and at the rate of eleven (11) per cent per annum, computed upon the balance of the purchase price then unpaid, during the period of any default in payment. Such additional purchase money and interest is to be paid in monthly installments of Three Hundred Twenty (See Paragraph 3K) ($ 320.00) dollars each, or more at Purchaser's option, on the 1st day of each month, beginning September 1, 1987; such payments to be applied first upon interest and the balance on principal. All of the purchase money and interest shall, however, be fully paid within seven years from the date hereof, anything herein to the contrary notwithstanding.

Seller's Duty to Convey

(c) To execute and deliver to Purchaser or his assigns, upon payment in full of all sums owing hereon, less the amount then owing on any unpaid mortgage or mortgages, and the surrender of the duplicate of this contract, a good and sufficient warranty deed conveying title to the land, subject to abovementioned restrictions and easements and to any then unpaid mortgage or mortgages, but free from all other encumbrances, except such as may be herein set forth or shall have accrued or attached since the date hereof through the acts or omissions of persons other than Seller or his assigns.

Furnishing Evidence of Title

(d) To deliver to Purchaser as evidence of title, at Seller's option, either an owner's policy of title insurance or abstract of title covering the land, and furnished by The effective date of the policy or certification date of the abstract is to be approximately the date of this contract. Seller shall have the right to retain possession of such evidence of title during the life of this contract but upon demand shall lend it to Purchaser upon the pledging of a reasonable security

2. **Purchaser Agrees:**

Purchaser's Duties

(a) To purchase the land and pay Seller the sum aforesaid, with interest thereon as above provided.

Maintenance of Premises

(b) To use, maintain and occupy the land in accordance with any and all building and use restrictions applicable thereto.

(c) To keep the land in accordance with all police, sanitary or other regulations imposed by any governmental authority.

(d) To keep and maintain the land and the buildings thereon in as good condition as they are at the date hereof and not to commit waste, remove or demolish any improvements thereon, or otherwise diminish the value of Seller's security, without the written consent of Seller.

To Pay Taxes and Keep Premises Insured

(e) To pay all taxes and special assessments hereafter levied on the land before any penalty for non-payment attaches thereto, and submit receipts to Seller upon request, as evidence of payment thereof; and also at all times to keep the buildings now or hereafter on the land insured against loss and damage, in manner and to an amount approved by Seller, and to deliver the policies as issued to Seller with the premiums fully paid.

FORM 11

EXHIBIT A

If an amount representing estimated monthly cost of taxes, special assessments and insurance is inserted in Paragraph 2 (f), then the method of payment of these items therein indicated shall be adopted. If such an amount is not inserted, then Paragraph 2 (f) shall be of no effect and the method of payment provided in Paragraph 2 (e) shall apply.

(f) To pay monthly in addition to the monthly payment hereinbefore stipulated, the sum of: Sixty ($ 60.00) dollars, which is an estimate of the monthly cost of the taxes, special assessments, and insurance premiums for the land, which shall be credited by Seller on the unpaid principal balance owing on the contract. If Purchaser is not in default under the terms of this contract, Seller shall pay for Purchaser's account the taxes, special assessments and insurance premiums mentioned in Paragraph 2 (e) above when due and before any penalty attaches, and submit receipts therefor to Purchaser upon demand. The amounts so paid shall be added to the principal balance of this contract. The amount of the estimated monthly payment, under this paragraph, may be adjusted from time to time so that the amount received shall approximate the total sum required annually for taxes, special assessments and insurance. This adjustment shall be made on demand of either of the parties and any deficiencies shall be paid by Purchaser upon Seller's demand.

(g) That he has examined a title insurance ~~policy~~/commitment dated June 19~~88~~87 ~~an abstract of title certified to~~ covering the land, and is satisfied with the marketability of title shown thereby. Delivery of such title policy or abstract, or an owner's title policy issued pursuant to such commitment, to Purchaser shall constitute fulfillment of Seller's agreement to furnish title evidence herein contained.

(h) That he has examined the land and is satisfied with the physical condition of any structure thereon, and hereby waives any and all claims on account of any encroachments on the land or on any premises adjacent thereto.

3. Seller and Purchaser Mutually Agree:

(a) That Seller may at any time encumber the land by mortgage or mortgages to secure not more than the balance owing hereon at the time such mortgage or mortgages are executed, which mortgage or mortgages shall provide for payments of principal and/or interest not in excess of nor sooner than those provided for in this contract, and shall be a first lien upon the land superior to the rights of Purchaser therein; provided notice of the execution of such mortgage or mortgages containing the name and address of the mortgagee or his agent, the amount of such mortgage or mortgages and the rate of interest and maturity of the principal and interest shall be sent to Purchaser by certified mail promptly after execution thereof. Purchaser shall, on demand of the Seller, execute any instruments that may be required for the exercise of the foregoing power. If Purchaser shall refuse to execute any such instruments demanded by Seller or to accept such certified mail, or such certified mail shall be returned unclaimed, then Seller may post such notice in two conspicuous places on the land, and make affidavit of such facts and of such posting, after which Purchaser's rights shall be subordinated to such mortgage or mortgages as hereinbefore provided. The consent obtained, or subordination effected as herein provided, under or by virtue of the foregoing power, shall extend to any and all renewals, extensions or amendments of such mortgage or mortgages after Seller has given notice thereof to Purchaser in like manner as is herein provided for giving notice of the execution of such mortgage or mortgages, except as to amendments which would increase the mortgage amount to one in excess of that owing hereon, or provide for a rate of interest in excess of that provided or a maturity date sooner than provided herein.

(b) That if the title of Seller is evidenced by land contract or now or hereafter encumbered by mortgage, Seller shall meet the payments of principal and interest thereon as they mature and produce evidence thereof to Purchaser on demand. On Seller's default Purchaser may pay the same, which payments shall be credited on the sums matured or first maturing hereon with interest at % per annum on payments so made. If proceedings are commenced to recover possession of the land or to enforce the payment of such contract or mortgage, because of Seller's default, Purchaser may at any time thereafter while such proceedings are pending encumber the land by mortgage securing such sums as can be obtained upon such terms as may be required and with the proceeds pay and discharge such mortgage or purchase money lien, and any mortgage so given shall be a first lien upon the land superior to the rights of Seller therein. Thereafter Purchaser shall pay the principal and interest on such mortgage so given as they mature, which payments shall be credited on the sums matured or first maturing hereon. When the amount owing hereon is reduced to that owing upon such contract or mortgage or upon any mortgage executed under either of the powers contained in this contract, a conveyance shall be made in the form above provided with a covenant by the grantee to assume and pay the same.

(c) That if default is made by Purchaser in the payment of any tax or special assessment or insurance premiums or in the delivery of insurance as above provided, Seller may pay such tax, special assessment or premiums or procure such insurance and pay the premiums therefor, and any amount so paid shall be a further lien on the land payable by Purchaser to Seller forthwith with interest at 11 % per annum. This provision shall be effective only if Paragraph 2 (e) applies.

(d) That during the existence of this contract, any proceeds received from a hazard insurance policy covering the land shall first be used to repair the damage and restore the property, with the balance of such proceeds, if any, being distributed to Seller and Purchaser, as their interests may appear.

(e) That no assignment or conveyance by Purchaser shall create any liability whatsoever against Seller until a duplicate thereof duly witnessed and acknowledged, containing the residence address of the assignee, shall be delivered either personally or by certified mail to Seller and receipt therefor obtained. Purchaser's liability hereunder shall not be released or affected in any way by delivery of such assignment, or by Seller's endorsement of receipt or acceptance thereon.

(f) That Purchaser shall have the right to possession of the land from and after the date hereof, unless otherwise herein provided, and be entitled to retain possession thereof only so long as there is no default on his part in carrying out the terms and conditions hereof. If the land is vacant or unimproved, Purchaser shall be deemed to be in constructive possession only, which possessory right shall cease and terminate after service of a notice of forfeiture of this contract. Erection of signs by Purchaser on vacant or unimproved property shall not constitute actual possession by him.

(g) That should Purchaser fail to perform this contract or any part thereof, Seller immediately after such default shall have the right to declare this contract forfeited and void, and retain whatever may have been paid hereon, and all improvements that may have been made upon the land, together with additions and accretions thereto, and consider and treat Purchaser as his tenant holding over without permission and may take immediate possession of the land, and Purchaser and each and every other occupant remove and put out. If service of a notice of forfeiture is relied upon by Seller to terminate rights hereunder, a notice of intention to forfeit this contract shall have been served at least fifteen (15) days prior thereto.

(h) That if proceedings are taken to enforce this contract by equitable action, after Purchaser shall have been in default for a period of forty-five (45) days or more, the entire amount owing hereon shall be due and payable forthwith, anything herein contained to the contrary notwithstanding.

(i) That time shall be deemed to be of the essence of this contract.

(j) That any declarations, notices or papers necessary or proper to terminate, accelerate or enforce this contract shall be conclusively presumed to have been served upon Purchaser if such instrument was enclosed in an envelope with postage fully prepaid, addressed to Purchaser at the address set forth in the heading of this contract or at the latest other address which may have been specified by Purchaser and receipted for in writing by Seller, and such envelope was deposited in the United States government mail.

(k) The first nine (9) monthly payments will include an additional sum of Two Hundred ($200.00) Dollars per month, i.e., payments will be $520.00 per month for the first nine months plus Sixty ($60.00) Dollars per month tax escrow. Thereafter, $320.00 per month plus $60.00 per month tax escrow.

(l) No prepayment penalty shall apply.

(m) Purchas understands that at the e of the seven years on this Land Contract, there will be a balloon payment due and owing on the remaining balance.

Dower Rights

If the wife of Seller has dower rights in the land, she agrees, by joining in the execution of this contract, to join in executing the deed to be given in fulfillment hereof.

Capacity of Parties

Any individual parties hereto represent themselves to be of full age. Any corporate parties hereto represent themselves to be existing corporations with their charters in full force and effect.

Interpretation of Contract

The pronouns and relative words herein used are written in the masculine and singular. If, however, more than one person joins in the execution hereof as Seller or Purchaser, or either party be of the feminine sex or a corporation, such words shall be read as if written in plural, feminine or neuter, respectively. The covenants herein shall bind the heirs, devisees, legatees, successors and assigns of the respective parties.

Signatures

Signed, sealed and delivered by the parties in duplicate the day and year first above written.

IN PRESENCE OF:

John P. Hartwig

Rebecca Szymaszek
Rebecca Szymaszek

STEVE A. DIAZ (L.S.)

EILEEN V. PRETTO (L.S.)

JOHN A. GIORDANO (L.S.)

PAULA GIORDANO (L.S.)

Individual Acknowledgment

STATE OF MICHIGAN
COUNTY OF OAKLAND ss.

On this 25th day of August 19 87 before me appeared Steve A. Diaz and Eileen V. Pretto, his wife; and John A. Giordano and Paula Giordano, his wife to me known to be the person S described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My commission expires 19

JOHN P. HARTWIG, Notary Public
Oakland County
My Commission Expires Feb. 18, 1990

Notary Public, Oakland County, Michigan

Corporate Acknowledgment

STATE OF MICHIGAN
COUNTY OF ss.

On this day of 19 before me appeared

to me personally known, who being by me sworn, did (1) say that (2) the

of

the corporation named in and which executed the within instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said

acknowledged said instrument to be the free act and deed of said corporation.

My commission expires 19

Note: If more than one officer acknowledges insert at (1) "each for himself," and (2) "they are respectively"

Notary Public, County, Michigan

Instrument Drafted by: John P. Hartwig

Business Address: 1500 N. Woodward, Suite 100, Birmingham, MI 48011

EXHIBIT B
DIVORCE JUDGMENT/RECORDED JUDGMENT LIEN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Steve A. Diaz, SS# 376-56-4931,
72 West End
Waterford, Michigan 48328

RECEIVED FOR FILING
OAKLAND COUNTY CLERK

Plaintiff,

-vs-

Case No. 93 459970 DM
Judge David F. Breck

94 JUN -9 P2:21

$ 27.00 MISCELLANEOUS RECORDING
$ 2.00 REMONUMENTATION
7 SEP 94 8:54 A.M. RECEIPT# 138
PAID RECORDED - OAKLAND COUNTY
LYNN D. ALLEN, CLERK/REGISTER OF DEEDS

Eileen V. Pretto, SS# 373-66-0626,
167 Riviera
Waterford, Michigan 48328

Defendant.
_____/

Seymour Markowitz - P17094
Attorney for Plaintiff
17000 W. Eight Mile Rd.
Southfield, MI 48075
(810) 559-0740

Dennis W. Cleary - P1196
Attorney for Defendant
39555 Orchard Hill Place, #315
Novi, MI 48375
(810) 334-0440

STATE OF MICHIGAN)
COUNTY OF OAKLAND) SS.

LYNN D. ALLEN, County Clerk for the County of Oakland
Clerk of the Circuit Court thereof, the same being a
Court of Record and having a Seal, hereby certify that
the attached is a true copy.
In Testimony whereof, I have hereunto set my hand and
placed the Seal of said Court this _____
LYNN D. ALLEN, Clerk-Register of Deeds JUN 9 1994
_____ Deputy Clerk

WITHDRAWAL JUDGMENT OF DIVORCE

At a session of said Court held in the
Courthouse Tower, City of Pontiac,
County of Oakland, State of Michigan, on

June 6, 1994

PRESENT: HONORABLE David Breck
Circuit Judge

This cause having been brought on to be heard, Defendant's pleadings having been withdrawn by Stipulation, and the proofs having been taken in open Court, from which it satisfacto-

EXHIBIT B

O.K. - JS

rily appears to this Court that the material facts alleged in the Complaint are true, and that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

On motion of Seymour Markowitz, Attorney for Plaintiff;

ABSOLUTE DIVORCE

IT IS HEREBY ORDERED AND ADJUDGED that the marriage between the said Plaintiff and Defendant be and the same hereby is dissolved, and a Divorce from the bonds of matrimony between said parties is hereby adjudged, according to the Statute in such case made and provided.

PARTIES' ADDRESS

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, presently residing at 72 West End, Waterford, Michigan 48328, and the Defendant, presently residing at 167 Riviera, Waterford, Michigan 48328, shall notify the Oakland County Friend of the Court, Pontiac, Michigan, within twenty-one days, of any change of residential address after the date the support provision is operative, or until the further Order of this Honorable Court.

CUSTODY OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff and Defendant are awarded the joint care, custody, maintenance and education of the minor children of the parties, to wit: Stephanie, born 10-15-84, Amanda, born 5-18-86, Steven, born 12-5-87, and Matthew, born 12-5-89, with physical custody to the Defendant, until each said child shall attain the age of

eighteen years or until the further Order of this Honorable Court.

SUPPORT OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff shall pay to the Defendant, through the Office of the Oakland County Friend of the Court, Pontiac, Michigan, in advance, the sum of One Hundred Sixty Eight and 00/100 Dollars ($168), per week, each and every week for and as support of the four minor children of the parties hereto, and as support for each child terminates, the sum of One Hundred Forty Eight and 00/100 Dollars ($148), per week each and every week for and as support of three minor children, and the sum of One Hundred Sixteen and 00/100 Dollars ($116), per week each and every week for and as support of two minor children, and the sum of Seventy Five and 00/100 Dollars ($75), per week each and every week for and as support of one minor child of the parties hereto, until each said child attains the age of eighteen years or graduates from high school, whichever occurs later, but not beyond nineteen years and six months (19 1/2), as provided by P.A. 237-245 1990, or as otherwise ordered by this Honorable Court.

IT IS FURTHER ORDERED AND ADJUDGED that the father receive a fifty (50%) percent retroactive abatement of the child support obligation each time after the minor child spends eight (8) consecutive overnight periods with the father.

RETROACTIVITY

IT IS FURTHER ORDERED that except as otherwise provided in Section 3 of the Support and Visitation Enforcement Act, Act.

No. 295 of the Public Acts of 1982, being Section 552.603 of the Michigan Compiled Laws, a support order that is part of a Judgment or is an Order in a domestic relations matter as that term is defined in Section 31 of the Friend of the Court Act, Act. No. 294 of the Public Acts of 1982, being Section 552.531 of the Michigan Compiled Laws, is a Judgment on and after the date each support payment is due, with the full force, effect, and attributes of a Judgment of this State, and is not, on and after the date it is due, subject to retroactive modification.

SERVICE FEE

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff shall pay to the Oakland County Friend of the Court, Pontiac, Michigan, the sum of Three and 25/100 ($3.25) Dollars per month, payable semi-annually in advance, on January 2nd and July 2nd, hereafter while the Order for Support is operative. Initial payments for the next regular due date shall be made forthwith.

ARREARAGE AND PRESERVATION OF ORDERS

IT IS FURTHER ORDERED AND ADJUDGED that any back temporary support due and owing under any order of this Court as of the date of this Judgment and any orders with respect to health care or rental payments be hereby preserved and payable forthwith.

INCOME WITHHOLDING

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to MCL 522.604, an immediate Order of Income Withholding shall issue in the amount of current support, plus an appropriate amount as required by Court policy to cover support arrearages if

any exist including but not limited to 50% of any lump sum payments if the support arrearage exceeds $1,000.00, and 75 cents per week as statutory service fees, and that the Payor shall make all payments to the Office of the Friend of the Court until said Order of Income Withholding is effectuated by the Payor's source of income.

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to MSA 25.164(10), the payer shall give the Office of the Friend of the Court the name and address of his employer. The payer shall immediately give to the Office of the Friend of the Court notice of the name and address of any subsequent employer.

MEDICAL, DENTAL AND HOSPITAL EXPENSES

IT IS FURTHER ORDERED that both the Plaintiff and the Defendant shall obtain or maintain any health care coverage that is available to them, at a reasonable cost, as a benefit of employment for the benefit of the children who are the subject of this Order.

IT IS FURTHER ORDERED that the Plaintiff and Defendant shall each pay fifty (50%) percent of the uninsured medical, dental, hospital, optical, pharmaceutical and orthodontic expenses for the parties' four minor children, until each said child shall attain the age of eighteen years or until the further Order of this Honorable Court.

IT IS FURTHER ORDERED that the Plaintiff and Defendant shall give the Office of the Friend of the Court information regarding any health care coverage or changes thereto that is available to said party as a benefit of employment or that is

maintained by said party; the name of the insurance company, health care organization, or health maintenance organization; the policy, certificate or contract number; and the names and birthdates of the persons for whose benefit said party maintains health care coverage under the policy, certificate, or contract.

VISITATION PRIVILEGES

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff shall have reasonable visitation privileges with the minor children of the parties hereto until each said child shall attain the age of eighteen years or until the further Order of this Honorable Court.

DOMICILE PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that the legal custodian of the minor children of the parties notify the Oakland County Friend of the Court, Pontiac, Michigan, of any change of residence address of each minor child presently residing at 167 Riviera, Waterford, Michigan, and that the domicile or residence of each said child shall not be removed from the State of Michigan without the prior approval of this Court.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that permanent alimony for each party is hereby barred.

MUTUAL DOWER RELEASE

IT IS FURTHER ORDERED AND ADJUDGED that any rights of either Plaintiff or Defendant in any lands held by the other shall be hereby extinguished. Further, that each shall hereafter

hold his or her remaining lands free, clear and discharged from any such dower right or claim that the other may have in any property which each may own or may hereafter own, or in which each has or may hereafter have any interest.

PENSION

IT IS FURTHER ORDERED AND ADJUDGED that each party shall keep and retain, as their exclusive property, free and clear of any claim by the other, any pension benefits to which they are now entitled or may be in the future.

STATUTORY INSURANCE PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that any rights of either party in any policy or contract of life, endowment or annuity insurance of the other as beneficiary are hereby extinguished, unless specifically preserved by this Judgment.

PROPERTY SETTLEMENT

IT IS FURTHER ORDERED AND ADJUDGED that the real property located at 167 Riviera, 40 West End, 1048 LaSalle, and Defendant's interest in 61 West End, Waterford, Michigan, shall be awarded to the Defendant free and clear of any claim or interest of the Plaintiff. That the Defendant shall assume any outstanding obligation on said property and shall hold the Plaintiff harmless therefrom. That the Defendant shall be awarded the furniture, furnishings and appliances located at each said property free and clear of any claim or interest of the Plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that, commencing April 1, 1994, Defendant shall receive all rentals from the

property located at 1048 LaSalle, Waterford, Michigan.

IT IS FURTHER ORDERED AND ADJUDGED that the real property located at 72 West End, Waterford, Michigan, shall be awarded to the Plaintiff subject to a lien in favor of the Defendant in the amount of seven (7%) percent interest per annum payable within one year from March 30, 1994, for the following debts which Plaintiff owes to the Defendant: 1) Any child support arrearages; 2) Rental arrearages in the amount of Nine Hundred ($900.00) Dollars relative to the property at 1048 LaSalle, Waterford, Michigan; 3) Any arrearages owed on the land contract relative to 1048 LaSalle, Waterford, Michigan, as of March 31, 1994, These arrearages amount to Seven Thousand Five Hundred Four ($7,504.00) Dollars. That the Plaintiff shall assume any outstanding obligation thereon and hold the Defendant harmless therefrom. That the Plaintiff shall be awarded the furniture, furnishings and appliances located at said property free and clear of any claim or interest of the Defendant.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff has the right of redemption by April 15, 1994, relative to the back taxes owing to the State of Michigan on the property located at 85 Monterray, Pontiac, Michigan. If Plaintiff chooses to redeem said property, it shall be awarded to him. If Plaintiff chooses not to redeem said property, then Defendant shall have the option to redeem said property and same shall be awarded to her.

IT IS FURTHER ORDERED AND ADJUDGED that the 1985 Dodge Charger and the 1987 Chevrolet Chevette be awarded to the Defendant free and clear of any claim or interest of the Plain-

tiff and Defendant shall assume any outstanding obligation thereon and hold the Plaintiff harmless therefrom.

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties retain the personal property presently in their respective possessions.

RELEASE OF ATTORNEYS

IT IS FURTHER ORDERED AND ADJUDGED that the Attorney or Attorneys, if any, for the parties shall be, and are hereby, released as attorneys of record in Post-Judgment proceedings, unless specifically hereinafter retained by the respective client for such Post-Judgment action.

WARRANTY OF FULL DISCLOSURE

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto has made a full and complete disclosure of all assets; and that the assets as disclosed in this Judgment of Divorce are the only assets currently held by each of the parties hereto; and that the parties hereto have warranted to each other that there are not other assets currently being held by the other parties for them.

Circuit Judge

Approved:

Steve A. Diaz,
Plaintiff

Eileen V. Pretto,
Defendant

Seymour Markowitz
Attorney for Plaintiff

Dennis W. Cleary
Attorney for Defendant

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OAKLAND COUNTY                TOWNSHIP OF WATERFORD                09/06/94 11:09
                        LAND INQUIRY FOR W  13-25-430-010
                       HOME EX:      %EX:                          A/V:       18,000
SCHOOL: 280    ZONE: SI    USE: SI    NBRD: 25G    BANK:          ESTAB:
          *----------NAME 1----------* *----------NAME 2----------*
OWNER(S): CARL F & ANN LOUISE HUNT
        ADDR  *--(DIR STREET SUFFIX,QUAL)--* *----(CITY STATE ZIPCODE)----*
PROP:       61 WEST END                      WATERFORD          MI 48328-3717
MAIL:
DESCRIPTION:
       01 T3N, R9E, SEC 25                          39021
       02 LEFFEL'S SUB
       03 LOT 14
                              NEXT CVT: W  PARCEL: 13 25 430 010
PF-KEY:    2:DESC03  3:HELP  5:PRINT  6:ADDR  7:NEXT  8:PRIOR  9:NOTES  10:MENU
OAKLAND COUNTY                TOWNSHIP OF WATERFORD                09/06/94 11:09
                        LAND INQUIRY FOR W  13-25-429-035
LAST ACT: 05/02/94   HOME EX: 1    %EX: 100  05/02/1994           A/V:       19,200
SCHOOL: 280    ZONE: SI    USE: SI    NBRD: 25G    BANK:          ESTAB:
          *----------NAME 1----------* *----------NAME 2----------*
OWNER(S): STEVE A DIAZ
        ADDR  *--(DIR STREET SUFFIX,QUAL)--* *----(CITY STATE ZIPCODE)----*
PROP:       72 WEST END                      WATERFORD          MI 48328-3716
MAIL:
DESCRIPTION:
       01 T3N, R9E, SEC 25
       02 LEFFEL'S SUB
       03 LOT 41
                              NEXT CVT: W  PARCEL: 13 25 429 035
PF-KEY:    2:DESC03  3:HELP  5:PRINT  6:ADDR  7:NEXT  8:PRIOR  9:NOTES  10:MENU
OAKLAND COUNTY                TOWNSHIP OF WATERFORD                09/06/94 11:10
                        LAND INQUIRY FOR W  13-25-429-027
                       HOME EX:      %EX:                          A/V:       18,800
SCHOOL: 280    ZONE: SI    USE: SI    NBRD: 25G    BANK:          ESTAB:
          *----------NAME 1----------* *----------NAME 2----------*
OWNER(S): KEITH GALBRAITH
        ADDR  *--(DIR STREET SUFFIX,QUAL)--* *----(CITY STATE ZIPCODE)----*
PROP:       40 WEST END                      WATERFORD          MI 48328-3716
MAIL:     100 MIAMI, APT D                   PONTIAC            MI 48341
DESCRIPTION:
       01 T3N, R9E, SEC 25
       02 LEFFEL'S SUB
       03 LOT 33
                              NEXT CVT: W  PARCEL: 13 25 429 027
PF-KEY:    2:DESC03  3:HELP  5:PRINT  6:ADDR  7:NEXT  8:PRIOR  9:NOTES  10:MENU
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OAKLAND COUNTY                    TOWNSHIP OF WATERFORD                    09/07/94 08:48
                              LAND INQUIRY FOR W  13-27-433-008
LAST ACT: 05/02/94   HOME EX: 1    %EX: 100  05/02/1994          A/V:       53,900
SCHOOL: 280   ZONE: SI   USE: SI   NBRD: 26E   BANK:          ESTAB:
        *----------NAME 1----------* *----------NAME 2----------*
OWNER(S): EILEEN V FRETTO
       ADDR  *--(DIR STREET SUFFIX,QUAL)--* *----(CITY STATE ZIPCODE)----*
PROP:    167 RIVIERA                       WATERFORD          MI 48328-3466
MAIL:
DESCRIPTION:
      01 T3N, R9E, SEC 27                          04 LOTS 973 & 974
      02 ELIZABETH LAKE ESTATES SUB
      03 NO 3

                                NEXT CVT: W  PARCEL: 13 27 433 008
PF-KEY:   2:DESC04  3:HELP  5:PRINT  6:ADDR  7:NEXT  8:PRIOR  9:NOTES  10:MENU
OAKLAND COUNTY                    TOWNSHIP OF WATERFORD                    09/07/94 08:48
                              LAND INQUIRY FOR W  13-25-406-022
                             HOME EX:      %EX:                          A/V:       12,100
SCHOOL: 280   ZONE: SI   USE: SI   NBRD: 25G   BANK:          ESTAB:
        *----------NAME 1----------* *----------NAME 2----------*
OWNER(S): MR STEVE A. DIAZ
       ADDR  *--(DIR STREET SUFFIX,QUAL)--* *----(CITY STATE ZIPCODE)----*
PROP:   1048 LA SALLE                       WATERFORD          MI 48328-3746
MAIL:     40 WEST END                       WATERFORD          MI 48328-3716
DESCRIPTION:
      01 T3N, R9E, SEC 25
      02 HURON GARDENS
      03 LOT 168

                                NEXT CVT: W  PARCEL: 13 25 406 022
PF-KEY:   2:DESC03  3:HELP  5:PRINT  6:ADDR  7:NEXT  8:PRIOR  9:NOTES  10:MENU
```

42014

21009

EXHIBIT C
DIAZ MORTGAGE

LIBER 15019 PAGE 693

94 266220

RECORD AND RETURN TO:
AMERICAN ACCEPTANCE MORTGAGE CORPORATION
673 MARTIN L. KING JR. BLVD., N.
PONTIAC, MICHIGAN 48342

$ 17.00 MORTGAGE
$ 2.00 REMONUMENTATION
5 OCT 94 1:05 P.M. RECEIPT# 1228
PAID RECORDED - OAKLAND COUNTY
LYNN D. ALLEN, CLERK/REGISTER OF DEEDS

[Space Above This Line For Recording Data]

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on SEPTEMBER 7, 1994 . The mortgagor is STEVE A. DIAZ, SINGLE MAN

whose address is 72 WEST END, WATERFORD, MICHIGAN 48328 ("Borrower"). This Security Instrument is given to AMERICAN ACCEPTANCE MORTGAGE CORPORATION

which is organized and existing under the laws of THE STATE OF MICHIGAN , and whose address is 673 MARTIN L. KING JR. BLVD., N. PONTIAC, MICHIGAN 48342 ("Lender"). Borrower owes Lender the principal sum of TWENTY TWO THOUSAND AND 00/100 Dollars (U.S. $ 22,000.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on SEPTEMBER 13, 2002 . This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and convey to Lender, with power of sale, the following described property located in OAKLAND County, Michigan:

SITUATED IN THE TOWNSHIP OF WATERFORD.
LOT 41 OF LEFFEL'S SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39 OF PLATS, PAGE 21, OAKLAND COUNTY RECORDS.

39021

17.00
12.00

13-25-429-035
which has the address of 72 WEST END, WATERFORD Street, City
Michigan 48328 ("Property Address");
Zip Code

O.K. - J.S.

166687

EXHIBIT C

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and Late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards, including floods or flooding, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld. If Borrower fails to maintain coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property in accordance with paragraph 7.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

& part of the principal

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect. If, for any reason, the mortgage insurance coverage required by Lender lapses or ceases to be in effect, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the mortgage insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve

payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall give notice of sale to Borrower in the manner provided in paragraph 14. Lender shall publish and post the notice of sale, and the Property shall be sold in the manner prescribed by applicable law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

22. Release. Upon payment of all sums secured by this Security Instrument, Lender shall prepare and file a discharge of this Security Instrument without charge to Borrower.

23. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.
[Check applicable box(es)]

- ☐ Adjustable Rate Rider
- ☐ Graduated Payment Rider
- ☐ Balloon Rider
- ☐ V.A. Rider
- ☐ Condominium Rider
- ☐ Planned Unit Development Rider
- ☐ Rate Improvement Rider
- ☐ Other(s) [specify]
- ☐ 1-4 Family Rider
- ☐ Biweekly Payment Rider
- ☐ Second Home Rider

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Witnesses:

Darica A. Goik

Sharon Sutherland
SHARON SUTHERLAND

_____ (Seal)
-Borrower

STEVE A. DIAZ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

STATE OF MICHIGAN, Oakland County ss:

The foregoing instrument was acknowledged before me this SEPTEMBER 7, 1994
(date)

by STEVE A. DIAZ, SINGLE MAN
(person acknowledging)

My Commission Expires:
DARICA A. GOIK
Notary Public, Oakland County, MI
My Commission Expires Oct. 10, 1995

Darica A. Goik
Notary Public

County, Michigan

This instrument was prepared by ALLAN D. DANIELS
673 MARTIN L. KING JR. BLVD., N.
PONTIAC, MICHIGAN 48342

EXHIBIT D
ORDER TO ENFORCE JUDGMENT BY FORECLOSURE AND OTHER REMEDIES

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STEVE A. DIAZ,

Plaintiff,

V.

EILEEN V. PRETTO-GRAVES,
f/k/a EILEEN V. PRETTO,

Defendant.

93-459970-DM

JUDGE: DAVID F. BRECK
DIAZ, STEVE A. V PRETTO, EILE

RECEIVED & FILED
OAKLAND COUNTY CLERK

'95 NOV 22 A9:51

BY _____
DEPUTY COUNTY CLERK

RONALD M. BARRON (P10493)
WAYNE S. SEGAL (P51430)
Attorneys for Defendant
200 E. Long Lake Road, Suite 180
Bloomfield Hills, MI 48304-2361
(810) 647-4440

A TRUE COPY
LYNN D. ALLEN
Oakland County Clerk and Register of Deeds
By _____ Deputy

ORDER TO ENFORCE JUDGMENT
BY FORECLOSURE AND OTHER REMEDIES

At a session of said court held in
the City of Pontiac, County of Oakland,
State of Michigan on NOV 22 1995

PRESENT: HONORABLE DAVID F. BRECK
DAVID F. BRECK

The matter coming on to be heard and the court being duly advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Defendant, EILEEN PRETTO-GRAVES shall be permitted to enforce her lien against Defendant STEVE DIAZ's real property by foreclosing upon 72 West End, Waterford, Michigan, in the manner provided by law for the

BARRON & ROSENBERG, P.C. • 200 E. LONG LAKE, SUITE 180 • BLOOMFIELD HILLS, MI 48304-2361 • (810) 647-4440

EXHIBIT D

foreclosure of mortgage liens, or pursuant to any other remedies provided by MCLA 552.625 and 552.627.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, EILEEN PRETTO-GRAVES shall be permitted to enforce her lien against Defendant STEVE DIAZ's real property by exercising such other rights as she may elect consistent with the rights of Judgment Creditors as provided by the statutory and common laws of the State of Michigan including but not limited to, Levy, Execution, Garnishment and Compulsory Examination of the Debtor to Discover Assets.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, EILEEN PRETTO-GRAVES is hereby awarded costs and attorney fees so wrongfully incurred in obtaining this Order. in the amount of $500.00

Dated: 11/22/95

HON. DAVID F. BRECK

BARRON & ROSENBERG, P.C. • 200 E. LONG LAKE, SUITE 100 • BLOOMFIELD HILLS, MI 48304-2361 • (810) 647-4440

EXHIBIT E
HOUSE LEGISLATIVE ANALYSIS
HOUSE BILL 5282, AUGUST 11, 1998

House
Legislative
Analysis
Section

Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

LAND CONTRACT MORTGAGES

House Bill 5282 as enrolled
Public Act 106 of 1998
Second Analysis (8-11-98)

Sponsor: Rep. Kim Rhead
House Committee: Commerce
Senate Committee: Financial Services

THE APPARENT PROBLEM:

According to the Real Property Law Section of the State Bar Association of Michigan, Michigan, unlike many jurisdictions, recognizes the sale of both improved and unimproved real estate upon land contract. The land contract sale divides the ownership and economic considerations between the seller and buyer. The seller retains legal title and the buyer obtains equitable title (the right to obtain legal title upon payment of the land contract in full). The seller obtains the income-stream of the land contract payments and the buyer obtains the rights of possession and related rights, such as the right to rental income from a tenant occupying the property.

Some have argued that these economic benefits create assets which sellers and buyers should be able to finance and mortgage in the same way as mortgages upon fee-ownership interests (so-called "real property mortgages"). However, these assets are generally not liquid because most commercial lending institutions are unwilling to lend money secured by a seller's or buyer's land contract interest.

As the Real Property Law Section of the State Bar Association of Michigan points out, the financing of land contract interest is subject to many legal uncertainties. It has been unclear, for example, how such mortgages should be filed and recorded. It is also unclear to lenders whether a land contract mortgage should be treated as a mortgage upon a real property interest, or a personal property interest. Under present law, it is equally unclear whether foreclosure and enforcement remedies are governed by mortgage foreclosure laws or laws involving personal property such as the Uniform Commercial Code. Consequently, land contract interests are not readily financeable. Some argue that legislation is needed to create a voluntary procedure to allow land contract mortgages, and to make it clear that such mortgages should be treated as real estate mortgages.

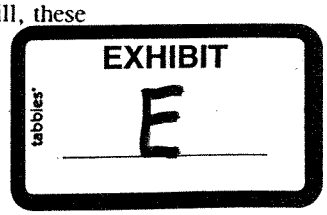
THE CONTENT OF THE BILL:

The bill would amend Public Act 237 of 1879, the Land Contract Act, regarding contracts for the sale of land, to allow the creation, recording, and enforcement of a mortgage granted against land contracts in generally the same fashion that is currently allowed for real estate mortgages. House Bill 5282 would add six sections to the act, and would repeal section 5 which governs the proper discharge of land contracts and sets penalties.

A land contract is an installment contract for the purchase and sale of land, wherein the seller or vendor retains title to the property pending payment of the final installment, at which time the title is transferred to the purchaser or vendee. The legal title to the property is retained by the seller until the obligations under the contract are completed. In a mortgage, an interest in land is created by a written instrument that provides security for the payment of the debt. The legal title of the property is held by the mortgagee, but title becomes void on the final payment of the debt by the mortgagor.

The bill would allow either a buyer or seller of property under a land contract to grant a land contract mortgage to secure any debt or obligation that could have been secured under a real estate mortgage. However, any otherwise enforceable contractual provisions that prohibited or provided for the default of the contract for mortgage, sale, assignment, or further encumbrance of the buyer's or seller's interest would not be defeated by the bill's provisions.

The mortgage would extend to the entire interest of the buyer or seller that granted it, unless otherwise provided, in the same fashion and to the same extent as would a real estate mortgage. The interest of the seller or buyer would include, but not be limited to, the seller's right to payment and the buyer's right to conveyance. For the purposes of the bill, these



interests would be treated as real property interests. The provisions of the bill would be in addition to existing legal rights and remedies with respect to financing and encumbering the buyer's and seller's interests in the land contract.

A land contract mortgage could be documented in the same way as would be sufficient to constitute a real estate mortgage, and would have to be in the same form and executed, acknowledged and recorded in the same fashion as a real estate mortgage. The interests encumbered by a land contract mortgage would not have to be specifically identified.

A land contract mortgage could be perfected by having it recorded in the same manner as a real estate mortgage and it would have the same standing as to other interests as a real estate mortgage. No other filing would be required. A land contract mortgage that had been perfected in this fashion would take priority over all other security or other interests in the buyer's or seller's interest except those that would have priority over a real estate mortgage in similar circumstances.

A land contract mortgage could be enforced in the same manner as a real estate mortgage, including judicial foreclosure and foreclosure by advertisement. A party that purchased the foreclosed mortgage interest would obtain all of the mortgaged rights and interests of the foreclosed seller or buyer. A land contract mortgagee would have the same rights and remedies available as would a real estate mortgagee under similar circumstances. Remedies that existed before the bill's effective date would continue to apply; however, a land contract mortgagee would have the option of enforcing a mortgage created under the bill's provisions in accordance with the bill.

A land contract mortgage would not affect the rights or remedies of parties to the land contract other than the seller or buyer who entered into the mortgage. However, if the buyer granted a land contract mortgage to a mortgagee who properly recorded it, the seller would be required to do all of the following: 1) provide the land contract mortgagee with the same notices regarding forfeiture or foreclosure as the seller would be required to provide the buyer; 2) name the land contract mortgagee as a party to any legal proceedings to terminate the land contract; and, 3) accept any cure of default on the land contract made by the land contract mortgagee that would have been accepted were it made by the buyer.

If the seller granted a land contract mortgage, the buyer would be required to continue to make payments in accordance with the terms of the contract until he or she received notice that foreclosure was completed without a redemption by the seller, after which the buyer would have to continue to pay the contract payments to the successful bidder at the foreclosure. However, if the mortgage contained an assignment of the buyer's payments, the buyer would have to make his or her payments to the mortgagee (after the buyer received a notice of default signed under oath by the mortgagee indicating that a default existed under the land contract mortgage, a copy of the recorded mortgage containing the assignment of the payments, and a demand that all further payments under the contract be made to the mortgagee).

A third party who wished to assert a lien or interest in the mortgaged property over the interest of the mortgagee would be required to give the mortgagee copies of the same notices as were provided to the buyer and seller; name the mortgagee as a party to any legal proceedings intended to terminate the mortgage; and accept any payment, performance, or cure from the mortgagee that would have been accepted if made by the seller or the buyer.

When the buyer had fully paid the contract, the seller would have to convey the land by an appropriate deed. Until the seller named in the contract had ceased in law to be bound to the contract, the obligation to convey the land would remain the obligation of the seller. However, if an assignee who held a mortgage on a land contract assumed the conveyance obligation, the original seller would be only secondarily liable.

When the buyer named in a land contract fully paid and performed the obligations of the land contract, all succeeding assignees and all succeeding grantees would have to make the conveyance of the land to the buyer, as specified in the land contract, or by quitclaim deed if the seller's assignee or grantee had not assumed the seller's conveyancing obligation. When a buyer had fully paid, the land contract mortgagee or the assignee would execute a discharge of the land contract mortgage in the same manner as now provided by law for the discharge of mortgages. A person who failed or refused to do so would be subject to the same penalties as are now provided by law for a refusal to discharge a real estate mortgage after it has been fully paid. Likewise, the party entitled to the conveyance could enforce the

conveyance in the same manner as with the discharge of mortgages.

The provisions of the bill would not render a title unmarketable if it would otherwise have been marketable. Neither would the bill void any appropriate subordination to other real estate interests.

MCL 565.351 to 565.355

FISCAL IMPLICATIONS:

The House Fiscal Agency notes that House Bill 5282 amends provisions of the Land Contract Act regarding mortgages granted against land contracts and would have no fiscal impact on the state or on local units of government. (6-10-98)

ARGUMENTS:

For:

The proponents of this legislation, the Real Property Law Section of the Bar Association of Michigan, point out that this bill creates a 'safe harbor' for prospective lenders and borrowers who seek to lend and borrow money collateralized by land contracts. The bill is intended to supplement existing law which can continue to be used by parties for such loans. The bill will remove existing legal uncertainties and will create an alternative predictable procedure for creating, recording and enforcing mortgage upon sellers' and buyers' land contract interests. To the extent possible, the bill adopts statutory and common law schemes for creating, recording and enforcing real estate mortgages.

Analyst: J. Hunault

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

EXHIBIT F
Wermes v McCowan, 286 I11. APP. 381
3NE2d 720 (1936)

286 Ill.App. 381

Appellate Court of Illinois, Second District.
WERMES
v.
MCCOWAN ET AL.
Gen. No. 9075.
Sept. 3, 1936.

Appeal from Circuit Court, Kane County; F. W. Shepherd, Judge.
Suit by Nicholas Wermes against Fred J. McCowan and others. From an adverse decree, the defendants appeal.
Decree modified and amended, and, as so amended, affirmed.

West Headnotes

[1] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Where mortgagee furnished money to mortgagor to complete payment due under mortgagor's contract of purchase with third party and at same time and place mortgagee took mortgage to secure loan made, mortgage held "purchase-money mortgage" and valid against judgment creditors of mortgagor, who had liens on equitable interest of mortgagor at time of loan and mortgage transactions.

[2] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Mortgage given at time of purchase of realty to secure payment of purchase money or balance thereof has preference over judgments and other debts of mortgagor to extent of land purchased.

[3] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

True test as to when mortgage is "purchase-money mortgage" is not whether it is executed to vendor,

EXHIBIT F

but whether proceeds are to be used to apply on purchase price.

KeyCite Notes

[4]

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Purchase-money mortgage will be given precedence over existing liens against mortgagor if purchase-money mortgage was executed as part of same transaction as execution of deed of purchase, so that the two instruments should be given contemporaneous operation in order to promote and carry out intention of parties, execution of the instruments not being required to be literally simultaneous.

*720 Mighell, Allen & Latham and William F. Fowler, all of Aurora (Everett Jordan and Fred T. Dean, both of Aurora, of counsel), for appellants.

Kames & Feldott, of Aurora (Joseph J. Feldott and D. J. Peffers, both of Aurora, of counsel), for appellee.

HUFFMAN, Presiding Justice.

Fred J. McCowan and wife entered into contract with Christ Seidel and wife to purchase an improved lot in the city of Aurora, for the sum of $12,100. McCowan and wife made payments to Seidel under the above purchase agreement until they had reduced it to the sum of $3,995. During the above period of time, Seidel and wife purchased some land from appellee. To secure appellee to the extent of $1,200 upon the purchase price of such land, Seidel and wife executed to appellee a mortgage on the lot upon which McCowan and wife had the purchase agreement. In order to keep the record straight, Seidel and wife had McCowan and wife sign the mortgage on this lot.

On January 28, 1931, appellant Elmer G. Magill secured a judgment against McCowan and wife, upon which judgment the sum of $438.75 remained due at the time of the decree herein. On January 31, 1931, appellant Royston & Co., secured a judgment against McCowan and wife, upon which the sum of $966.25 remained due at the time of the decree herein. During the year 1931, McCowan and wife were delinquent in making their payments to Seidel and wife on the lot under the contract of sale. They were desirous of completing the entire balance of the purchase price. In addition to this, Seidel was wanting the money in order that he might discharge his debt to appellee.

McCowan and wife made arrangements with appellee to advance $3,000 for them *721 to Seidel and wife toward payment of the $3,995 then remaining due upon said lot. They had enough cash from other sources to complete the purchase price. Pursuant to the above situation, the parties all met at the office of the attorney on August 8, 1931. Those present were the attorney and his secretary, the appellee, McCowan and wife, Seidel and wife, and Mr. McCowan's mother. At this meeting, appellee advanced the $3,000, which was paid to Seidel and wife, and McCowan and wife advanced enough additional cash to complete payment of the purchase price upon the lot. At this time McCowan and wife executed to appellee their notes for $3,000, secured by trust deed upon said lot. The entire transaction took place in the presence of all the above-named persons, and at the one meeting.

On March 21, 1935, appellee filed his bill to foreclose against the lot under the above trust deed. Appellants Magill and Royston & Co. answered, setting up their respective judgments and claiming the same to be prior liens to appellee's lien against said lot. Appellee took the position that his mortgage was a purchase-money mortgage, and therefore not subject to the liens of the said judgment creditors. The matter of appellants' judgments was stipulated between the parties. The court heard the

cause. Oral testimony was offered on behalf of appellee only. The court found the issues with appellee and decreed that the judgment liens of the appellants Magill and Royston & Co. were subordinate to appellee's, but prior to all other liens. Said judgment creditors have prosecuted this appeal from the above decree.

Appellants urge three reasons why appellee's mortgage should not be considered as a purchase-money mortgage. They first urge the deed and mortgage were not simultaneous acts; second, that their judgments were liens on McCowan's equitable interest and rights under the sales contract; and, third, that the money advanced by appellee was used to pay a pre-existing indebtedness. We will discuss the above positions of appellants in the order named.

[1] Appellants state that they consider the best case in this state, in support of their position that the acts were not simultaneous, to be that of Small v. Stagg, 95 Ill. 39. In this case the court, in discussing the deed to the property and the trust deed claimed to have been given to secure purchase money, makes the following statement: "The two were separate and distinct acts, and there is no testimony in the record from which it can be presumed that the three parties intended to have the two transactions bear any relation whatever to each other." 95 Ill. 39, at page 44. Under such circumstances certainly no claim to a purchase money mortgage could be maintained. In the above case the rule is recognized, "that where a person purchases a tract of land and secures a deed therefor, and at the same time executes a mortgage on the property to secure the purchase money, an existing judgment against the mortgagor does not become a lien as against the mortgage." 95 Ill. 39, at page 44. In Harrow v. Grogan, 219 Ill. 288, at page 291, 76 N.E. 350, 351, it is said: "that where, on the purchase of land, a deed is executed by the vendor, and a mortgage on the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously, and that the mortgage was intended to secure the purchase money." It is further stated that the court would presume, from the fact that a deed and mortgage were made on the same land and on the same day, that the mortgage was a purchase-money mortgage. It is recognized in the above case, 219 Ill. 288, at page 292, 76 N.E. 350, that the presumption that a mortgage, executed by the vendee on the same day upon which the land is conveyed, is a purchase-money mortgage, is subject to rebuttal. However, nothing appears in the record in this case to rebut the presumption that appellee's mortgage is a purchase-money mortgage. It was made and executed at the same time and place as the deed to the lot. In addition to the presumption prevailing, is the testimony of the witnesses for appellee, whose testimony stands undisputed, and supports his contention that his mortgage is a purchase money mortgage.

With reference to appellants' second point urged, that their judgments were liens on McCowan's equitable interest in the lot under the contract of sale, there is no dispute. However, their rights under their liens would have been no greater than McCowan's rights under the sales contract. The only interest or right that McCowan had under such contract was the equitable right to enforce the same providing he had performed it on his part. Thus we see that appellants, under such a lien, *722 would find the same subject to the payment of the unpaid purchase price upon said lot. Until payment of the purchase price, it is manifest that specific performance could not be had. Therefore appellants' rights are in no way injured or impaired. Hayes v. Carey, 287 Ill. 274, 277, 122 N.E. 524.

With reference to the third point urged by appellants, that the $1,200 previously advanced by appellee to Seidel and wife was a pre-existing debt of McCowan and wife, and therefore the money advanced by appellee on the date of the delivery of the deed and mortgage was advanced for a pre-existing indebtedness, we cannot agree. This position is not supported by the evidence; but, on the contrary, the evidence refutes such a claim, and clearly establishes the fact that the $1,200 was due from Seidel and wife to appellee upon the purchase price of land bought by them from appellee, and although McCowan and wife were caused to sign the mortgage with Seidel and wife, that no part of the debt was that of McCowan and wife.

[2] The rule that a mortgage given at the time of the purchase of real estate, to secure the payment of purchase money, or the balance thereof, has preference over judgments and other debts of the mortgagor, to the extent of the land purchased, is announced in Curtis v. Root, 20 Ill. 53, 54; Roane v. Baker, 120 Ill. 308, 314, 11 N.E. 246; Harrow v. Grogan, supra; and such other cases in this state as deal with this subject. It is stated in Curtis v. Root, supra, at page 58 of 20 Ill., that: "In point of right and principle, it can make no difference whether the mortgage is given to the vendor for the purchase money, or to another who actually advances the means to pay the purchase money to the vendor."

[3] [4] Some states provide by statute with reference to the above rights of a mortgagee of a purchase-money mortgage. In other states, such precedence is given to purchase-money mortgages without the aid of any statute. Among the latter group is this state. We consider the true test as to when a mortgage is a purchase-money mortgage, is not whether it is executed to the vendor, but whether the proceeds are to be used to apply on the purchase price. The rule as generally stated, is that, to give a purchase-money mortgage a precedence, it must have been executed simultaneously, or at the same time, with the deed of purchase. The reason usually assigned for this doctrine is the technical one of the mere transitory seisin of the mortgagor, rather than the superior equity which the mortgagee has, to be paid the purchase money of the land before it shall be subjected to other claims against the purchaser. However, it is evident, both upon principle and authority, that what is meant by this statement of the rule is not that the two acts--the execution of deed of purchase and the execution of the mortgage--should be literally simultaneous. This would be impossible. Some lapse of time must necessarily intervene between the two acts. We believe that an examination of the cases will show the real test is not whether the deed and mortgage were in fact executed at the same instant, but whether they were parts of one continuous transaction, and so intended to be by the parties, so that the two instruments should be given contemporaneous operation in order to promote and carry out the intention of the parties.

We thus find the various authorities on the question of purchase-money mortgages falling into two groups: The one, based upon the position that the execution of the deed and the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping in the purchaser, and that during such instantaneous passage, the judgment lien cannot attach to the title; while the other is disposed to consider the superior equity which the mortgagee might be said to have for the purchase money which he has advanced. This state has apparently adopted the theory of transitory seisin. However, under either position the result is the same, and purchase-money mortgages given precedence over existing judgments against the mortgagor.

It was stipulated that appellant Magill had $438.75 due him on his judgment, at time of trial of this case. The court so found by its decree. However, the attorneys who prepared the decree inadvertently caused this sum to be written as $187.25 in that portion of the decree providing for the payment of his lien. To this extent, the decree is in error. That part of the decree of the trial court providing how the

Ill.App. 2 Dist. 1936.
WERMES v. MCCOWAN ET AL.
3 N.E.2d 720, 286 Ill.App. 381
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EXHIBIT G

Liberty Parts Warehouse, Inc. v Marshall Co. Bank and Trust, 459 NE2d 738 (Ind App 1984)

West Reporter Image (PDF)

Court of Appeals of Indiana,
Third District.
LIBERTY PARTS WAREHOUSE, INC., Appellant-Defendant Below,
v.
MARSHALL COUNTY BANK & TRUST, Appellee-Plaintiff Below.
No. 3-583A142.
Feb. 15, 1984.

Bank brought mortgage foreclosure action against real estate purchaser and joined judgment creditor as party defendant, seeking to have latter's judgment lien against property in question declared subordinate to bank's mortgage. The Superior Court, Marshall County, R. Alexis Clarke, J., entered summary judgment in favor of bank, and judgment creditor appealed. The Court of Appeals, Staton, P.J., held that where proceeds of bank's loan were used by purchaser to acquire legal title to subject real estate, and deed and mortgage were executed as part of same transaction, bank held purchase money mortgage on real estate, giving it priority over prior judgment lien.
Affirmed.

West Headnotes

[1] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

A "purchase money mortgage" is one which is given as security for a loan, proceeds of which are used by mortgagor to acquire legal title to real estate.

[2] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

When deed and mortgage are executed as part of same transaction purchaser does not obtain title to property and then grant mortgage; rather, he is deemed to take title already charged with encumbrance.

[3] KeyCite Notes

266 Mortgages
266III Construction and Operation

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266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Tests employed in determining whether a mortgage is a purchase money mortgage are whether proceeds are applied to purchase price, and whether deed and mortgage are executed as part of same transaction.

[4] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Where proceeds of bank's loan were used by purchaser to acquire legal title to subject real estate, and deed and mortgage were executed as part of same transaction, bank held purchase money mortgage on real estate, giving it priority over prior judgment lien. IC 32-8-11-4 (1982 Ed.).
*738 James P. Hayes, Holmes & Hayes, Plymouth, for appellant.
Kenneth M. McDermott, Plymouth, for appellee.

STATON, Presiding Judge.
The Marshall County Bank & Trust Company (Bank) brought a mortgage foreclosure action against William Hoppe and joined Liberty Parts Warehouse, Inc. as a party defendant since it was a judgment creditor of William Hoppe. By joining Liberty, the Bank sought to have the judgment lien against the Hoppe property declared subordinate to the Bank's mortgage. Later, the Bank moved for a summary judgment. The trial court granted summary judgment for the Bank and Liberty appeals. The sole issue raised by Liberty is:
Whether the mortgage held by the Bank was a purchase money mortgage even though Hoppe already held equitable title *739 to the real estate purchased with the loan proceeds.
Affirmed.
The facts of this case were stipulated as follows: In 1976, William and Geraldine Hoppe executed a land contract for the purchase of the subject real estate from Effie Wise. In May, 1980, the marriage of William and Geraldine was dissolved and they agreed to hold the real estate as tenants in common. On October 10, 1980, Liberty obtained a judgment against William, which was duly recorded. On December 3, 1981, William obtained a loan from the Bank which was secured by a mortgage on the real estate. The Bank issued a check to Wise for the balance due on the land contract. Wise deeded the real estate to William and Geraldine. The same day, William purchased Geraldine's interest in the real estate giving Geraldine the remainder of the loan proceeds and a promissory note in exchange for a quitclaim deed to the real estate. The trial court determined the priority of the creditors to be: the Bank, first; Liberty, second; and Geraldine, third. [FN1]

FN1. Geraldine does not appeal the priority assigned to her claim.

Liberty contends that it is entitled to priority over the Bank because its lien was prior in time to the Bank's mortgage. Liberty acknowledges that a purchase money mortgage has priority over a prior

judgment lien, IC 1976, 32-8-11-4, but argues that the initial land contract constituted a sale and purchase of the real estate. Thus, Liberty asserts, the subsequent loan by the Bank was merely a refinancing of the initial obligation and cannot provide the basis for a purchase money mortgage. We disagree.

While we agree that the execution of the land contract between Wise and the Hoppes constituted a purchase and sale of the real estate, *Skendzel v. Marshall* (1973), 261 Ind. 226, 301 N.E.2d 641, 646, that proposition is unrelated to the question whether the Bank's mortgage was a purchase money mortgage. By executing the land contract with Wise, the Hoppes acquired equitable title to the real estate. *Id.* However, the relevant inquiry in determining the nature of the Bank's mortgage is its role in William's acquisition of legal title to the real estate.

[1] [2] [3] A purchase money mortgage is one which is given as security for a loan, the proceeds of which are used by the mortgagor to acquire legal title to the real estate. *Yarlott v. Brown* (1925), 86 Ind.App. 479, 149 N.E. 921. When the deed and mortgage are executed as part of the same transaction the purchaser does not obtain title to the property and then grant the mortgage; rather, he is deemed to take the title already charged with the encumbrance. [FN2] Because there is no moment at which the judgment lien can attach to the property before the mortgage of one who advances purchase money, the prior judgment lien is junior to the purchase money mortgage. Thus, the tests employed in determining whether a mortgage is a purchase money mortgage are whether the proceeds are applied to the purchase price, and whether the deed and mortgage are executed as part of the same transaction.

> FN2. Another basis for the priority given a purchase money mortgage is the superior equity which the mortgagee has in the purchase money he advanced. *See Wermes v. McCowan* (1936), 286 Ill.App. 381, 3 N.E.2d 720.

[4] In this case it is clear that proceeds of the Bank's loan to William were used by him to acquire legal title to the subject real estate, and that the deed and mortgage were executed as part of the same transaction. Thus, the Bank holds a purchase money mortgage on the real estate and the trial court correctly gave the Bank priority over Liberty pursuant to IC 32-8-11-4.

Affirmed.

GARRARD and HOFFMAN, JJ., concur.

Ind.App.3 Dist., 1984.

Liberty Parts Warehouse, Inc. v. Marshall County Bank & Trust

459 N.E.2d 738

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EXHIBIT H

C&L Lumber and Supply, Inc. v Texas American Bank/Galeria, 110 NM 291; 795 P2d 502 (1990)

West Reporter Image (PDF)

Supreme Court of New Mexico.
C & L LUMBER AND SUPPLY, INC., Plaintiff-Appellee,
v.
TEXAS AMERICAN BANK/GALERIA, Defendant-Appellant,
v.
George J. AUBIN, Wichita Equine, Inc., W.E. New Mexico, Inc., Kenny's Welding, Barney Rue, Frankie Reynolds, Briscoe West and Myrl West, Defendants-Appellees.
No. 18800.
June 13, 1990.

In proceeding to foreclose mechanics' and materialmen's liens on property, the District Court, Lincoln County, Robert M. Doughty, II, D.J., determined that mortgagee's mortgages were void and that priority of resulting equitable mortgage liens followed those of other lien claimants. Mortgagee appealed. The Supreme Court, Ransom, J., held that: (1) recitation in deed not signed by both spouses, that property is "sole and separate property" of married man, does not affect presumption that property acquired during marriage by either spouse is community property; (2) statute requiring spouses to join in mortgages of community real property is directed at conveyance itself, rather than identity of person claiming conveyance is void, and does not limit benefit for whom it may be used; (3) mortgage executed for purpose of paying off land sales contract is not "purchase-money mortgage"; and (4) lender who refinances purchase-money mortgage is not entitled, from that circumstance alone, to be subrogated to rights of holder of first mortgage.
Affirmed.

West Headnotes

[1] KeyCite Notes

205 Husband and Wife
205VII Community Property
205k261 Evidence as to Character of Property
205k262.1 Presumptions
205k262.1(2) k. Property Acquired During Marriage in General. Most Cited Cases

Recitation in deed not signed by both spouses, that property is "sole and separate property" of married man, does not affect presumption that property acquired during marriage by either spouse is community property. NMSA 1978, § 40-3-12, subd. A.

[2] KeyCite Notes

205 Husband and Wife
205VII Community Property
205k261 Evidence as to Character of Property
205k264 Weight and Sufficiency

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205k264(1) k. In General. Most Cited Cases

Party seeking to rebut presumption that property acquired during marriage by either spouse is community property has burden of introducing factual evidence that disputed property meets criterion of statute defining separate property. NMSA 1978, §§ 40-3-8, 40-3-12, subd. A.

[3] KeyCite Notes 

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases

Mortgagee, by failing to request finding or conclusion that property was separate property of married mortgagor, failed to preserve issue for appeal and, thus, could not contest trial court's finding treating property as community asset or obtain review of evidence supporting that characterization. SCRA 1986, Rule 1-052, subd. B(1)(f).

[4] KeyCite Notes 

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases

Party who has failed to request finding of ultimate fact has waived such finding and has not preserved question for appeal. SCRA 1986, Rule 1-052, subd. B(1)(f).

[5] KeyCite Notes 

205 Husband and Wife
205VII Community Property
205k267 Sales, Conveyances, and Incumbrances
205k267(6) k. Mortgage by Husband and Wife. Most Cited Cases

Statute requiring spouses to join in mortgages of community real property is directed at conveyance itself, rather than identity of person claiming conveyance is void, and does not limit benefit for whom it may be used. NMSA 1978, § 40-3-13.

[6] KeyCite Notes 

266 Mortgages
266III Construction and Operation

266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

"Purchase-money mortgage" is mortgage executed at same time as deed of purchase of land, or in pursuance of agreement as part of one continuous transaction, in favor of vendor, or third-party lender of purchase price paid to vendor, provided money was loaned for this purpose. NMSA 1978, § 40-3-13, subd. A.

[7] KeyCite Notes 

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Original financing by bank on property created "purchase-money mortgage" in favor of bank; purchaser granted mortgage as part of same transaction in which vendor executed deed of purchase transferring title to property. NMSA 1978, § 40-3-13, subd. A.

[8] KeyCite Notes 

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Refinancing of purchase-money mortgage, involving bank's paying off loan to mortgagee, did not create second "purchase-money mortgage," as title had already passed to mortgagor as part of original financing transaction; subsequent borrowing was for purpose of discharging original debt, not for acquisition of title. NMSA 1978, § 40-3-13, subd. A.

[9] KeyCite Notes 

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

Mortgage executed for purpose of paying off land sales contract is not "purchase-money mortgage.".

[10] KeyCite Notes 

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k54 k. Effect of Executory Contract on Title to Property. Most Cited Cases

Purchaser's equitable estate under land sales contract is estate in property.

KeyCite Notes

[11]

228 Judgment
228XV Lien
228k775 Property or Interest Affected and Extent of Lien
228k780 Estate or Interest of Judgment Debtor
228k780(3) k. Interests of Parties to Contract of Sale. Most Cited Cases

Purchaser under land sales contract is treated as owner and his interest in property is subject to judgment lien.

[12] KeyCite Notes

366 Subrogation
366k31 Assignment or Benefit of Security or Incumbrance
366k31(4) k. Assignment or Benefit of Mortgage, Judgment, or Lien. Most Cited Cases

Lender who refinances purchase-money mortgage is not entitled, from that circumstance alone, to be subrogated to rights of holder of first mortgage. NMSA 1978, § 40-3-13, subd. A.

[13] KeyCite Notes

205 Husband and Wife
205VII Community Property
205k267 Sales, Conveyances, and Incumbrances
205k267(.5) k. In General. Most Cited Cases
(Formerly 205k267)

Extensions on real estate note in mortgage did not grant mortgagee new mortgage, but merely extended original mortgage, which was void under statute requiring spouses to join in mortgages of community real property; instrument indicated that parties intended to extend note and "carry forward" lien and specifically required that original lien remain in effect. NMSA 1978, § 40-3-13, subd. A.

[14] KeyCite Notes

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k182 Estoppel Affecting Priority
266k183 k. In General. Most Cited Cases

Mortgagee of mortgage which was void under statute requiring spouses to join in mortgages of community real property had no right to rely on subordination agreement with vendors and, thus, vendors were not estopped to deny validity or priority of mortgage; mortgagee did not suggest that vendors concealed fact that purchaser mortgagor was married when he acquired property or that they were misled as to significance of that fact.

[15] KeyCite Notes 

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 k. Reliance on Adverse Party. Most Cited Cases

Reliance of party seeking to assert doctrine of estoppel must have been reasonable.

[16] KeyCite Notes 

157 Evidence
157II Presumptions
157k65 k. Knowledge of Law. Most Cited Cases

205 Husband and Wife
205VII Community Property
205k267 Sales, Conveyances, and Incumbrances
205k267(.5) k. In General. Most Cited Cases
(Formerly 205k267)

Bank mortgagee was charged with knowledge of law, including community property laws and statute requiring spouses to join in mortgages of community real property. NMSA 1978, §§ 40-3-12, subd. A, 40-3-13, subd. A.

[17] KeyCite Notes 

205 Husband and Wife
205VII Community Property
205k267 Sales, Conveyances, and Incumbrances
205k267(.5) k. In General. Most Cited Cases
(Formerly 205k267)

Mortgagor's after-acquired title, resulting from special warrant deeds executed by his wife, did not cure defect in original mortgages which were void under statute requiring spouses to join in mortgages of community real property.

***503 *292** The Payne Law Firm, H. Vern Payne, Diane P. Donaghy, Albuquerque, for appellant.
Gary C. Mitchell, Ruidoso, for appellee C & L Lumber.
Karen L. Parsons, Ruidoso, for appellee J.W. Moursund.
Hawthorne & Hawthorne, Richard A. Hawthorne, Ruidoso, for appellees Aubin, Wichita Equine and

W.E. New Mexico.
Darrell N. Brantley, Alamogordo, for appellees West.
Ronald G. Harris, Albuquerque, for appellees Kenny's Welding and Barney Rue.
H. John Underwood, Ruidoso, for appellee Frankie Reynolds.
Joe A. McDermott, Houston, Tex., pro se.

OPINION

RANSOM, Justice.
Texas American Bank appeals from a decision that its mortgages on two tracts of ***504 *293* Ruidoso land are void and that, in a proceeding to foreclose mechanics' and materialmen's liens on the property, the priority of such resulting equitable mortgage liens as were found by the court follows those of the other lien claimants. We affirm.
In August 1980, Joe McDermott, while married to Dixie McDermott, purchased from Briscoe and Myrl West a 1.7 acre tract (small tract) of land adjacent to the racetrack in Ruidoso. McDermott paid $10,000 in cash and entered into a real estate contract with the Wests for the remaining $80,000 of the purchase price. In October 1981, McDermott also purchased from the Wests an adjacent 6.4 acre tract (large tract) for $300,000. McDermott paid the Wests $200,000 in cash from a loan and mortgage with Ruidoso State Bank for that amount, and financed the other $100,000 through a second mortgage to the Wests on both tracts. Dixie McDermott joined in none of these instruments which stated that the property was the sole and separate estate of Joe McDermott, a married man.
In June 1983, McDermott borrowed $200,000 from Texas American Bank and paid off the loan to Ruidoso State Bank. Texas American Bank obtained a mortgage on the large tract and, pursuant to a subordination agreement with the Wests, was placed in first position over the Wests' mortgage of October 1981. McDermott also borrowed $120,000 from Texas American Bank in July 1983 and used $60,000 of the loan to pay off the real estate contract on the small tract. [FN1] Pursuant to this loan, the Bank obtained a mortgage on the small tract, and because of a subordination agreement with the Wests, acquired first position over the Wests' mortgage of September 1981.

> FN1. There is no evidence in the record that the loan proceeds from the refinancing transaction on the large tract were used in their entirety
>
> to pay off the purchase-money mortgage with Ruidoso State Bank. We do not decide whether the result of our opinion would have been the same if such facts had been established.

In August 1984, McDermott and his wife were divorced. At that time she conveyed to him her community interest in the two tracts by special warranty deed recorded in November 1984.
The promissory notes on the large and small tracts given by McDermott to Texas American Bank were due and payable in six months from the time of execution. However, the Bank and McDermott entered into various extension agreements between September 1984 and March 1985. Eventually, construction of horse barns was begun on the two tracts on April 7, 1986, and was substantially completed in July 1986.
C & L Lumber, the materials supplier for the construction project, brought suit in December 1986 to foreclose its materialmen's lien on the property. In the foreclosure action, the court determined the lien priorities of the following parties: Texas American Bank, the Wests, and mechanics' and materialmen's lien claimants C & L Lumber, Barney Rue, Frankie Reynolds, and Kenny's Welding.

The court held that Texas American Bank was not entitled to first priority as to either of the tracts because the mortgages granted by McDermott were void, not having been signed also by his wife. Except in the case of purchase-money mortgages, spouses must join in all mortgages of community real property. NMSA 1978 § 40-3-13(A) (Repl.Pamp.1989). Any attempt to mortgage community real property made by either spouse alone is void. *Id.*

Regarding the small tract, the court determined the lien priorities to be: (1) C & L Lumber, (2) Frankie Reynolds, (3) Kenny's Welding, (4) Barney Rue, and (5) Texas American Bank. Regarding the large tract, the lien priorities were determined to be: (1) the Wests, (2) Barney Rue, and (3) Texas American Bank.

Texas American Bank renews various arguments on appeal: that the Bank's refinancing of the West real estate contract and the Ruidoso State Bank mortgage created purchase-money mortgages which come within the exception set forth in Section 40-3-13(A); that the Bank was subrogated to the purchase- money mortgage position ***294 **505** held by the Wests and Ruidoso State Bank; that by virtue of the various extensions of the Bank's notes and liens, which were recorded before the mechanics' and materialmen's liens were perfected, the Bank has liens against both tracts superior to the mechanics' and materialmen's liens; that the Wests are estopped to deny the validity or priority of the Bank's mortgages on the large tract by virtue of the mortgage subordination agreement; that any defect in the Bank's mortgages was cured by "after-acquired title." Additionally, the Bank now claims that the court erred in applying the joinder requirement of Section 40-3-13(A) inasmuch as the two tracts were not community property. The Bank also asserts that it is error to apply the joinder requirement in favor of parties other than a nonsigning spouse.

Community property issues. We first address arguments that the Bank raises concerning the characterization of the two tracts as community property and the intended application of the joinder statute. The Bank asserts that the appellees failed to meet their burden of proving that the two tracts were community property. The Bank points to the documents executed by McDermott as "a married man dealing with his sole and separate property," and states that under *Sanchez v. Sanchez,* 106 N.M. 648, 748 P.2d 21 (Ct.App.), *cert. denied,* 106 N.M. 627, 747 P.2d 922 (1987), this raises a presumption that the property was McDermott's separate property. The Bank's argument misconstrues New Mexico community property law.

[1] [2] Under Section 40-3-12(A), property acquired during marriage by either spouse is presumed to be community property. The recitation in a deed not signed by both spouses that the property is the "sole and separate property" of a married man does not affect this presumption. The party seeking to rebut the presumption has the burden of introducing factual evidence that the disputed property meets a criterion of separate property as defined in Section 40-3-8. *Arch, Ltd. v. Yu,* 108 N.M. 67, 766 P.2d 911 (1989). Texas American Bank failed to produce at trial any evidence that would support a characterization of the two tracts as separate property under Section 40- 3-8; nor was it suggested that the tracts were purchased with McDermott's separate funds.

Additionally, the Bank is mistaken in its claim that it is entitled to the benefit of a presumption of separate property under *Sanchez.* In that case, the court applied a statutory presumption applicable to property acquired by a *married woman* in her name alone. *Sanchez,* 106 N.M. at 650, 748 P.2d at 23. Even so, the Community Property Act of 1973 repealed this presumption for transactions occurring after passage of the Act. *See* 1973 N.M.Laws, ch. 320, § 14; NMSA 1978, § 40-3-12.

[3] [4] Finally, we note that Texas American Bank never requested a finding or conclusion that the property was McDermott's *separate* property. A party who has failed to request a finding of ultimate fact has waived such a finding, SCRA 1986, 1-052(B)(1)(f), and has not preserved the question for appeal. *Davis v. Davis,* 77 N.M. 135, 419 P.2d 974 (1966). Having failed to preserve for appeal a question of McDermott's separate property, Texas American Bank cannot contest the court's

finding treating the property as a community asset, nor can the Bank obtain a review of the evidence supporting this characterization of the asset. *See Wagner Land & Inv. Co. v. Halderman,* 83 N.M. 628, 495 P.2d 1075 (1972).

[5] The Bank's final argument on this point is that Section 40-3-13 was intended to protect the interests of a nonjoining spouse, and the court erred in allowing lien claimants to raise the joinder issue. A review of our cases involving the joinder statute shows, however, that the issue has been raised by a variety of parties in addition to the nonjoining spouse. *See, e.g., Arch, Ltd. v. Yu,* 108 N.M. 67, 766 P.2d 911 (1989) (issue raised by husband, who alone executed real estate exchange agreement, as a defense to breach of contract action); *Hannah v. Tennant,* 92 N.M. 444, 589 P.2d 1035 (1979) (issue raised by vendees to avoid contract not joined by vendor's wife). *See also* ***506** ***295** *McGrail v. Fields,* 53 N.M. 158, 203 P.2d 1000 (1949) (spouses not parties to quiet title suit; decided under former law). The joinder statute is directed at the conveyance itself not at the identity of the person claiming the conveyance is void. We believe it contains no limitations regarding for whose benefit it may be used.

Purchase-money mortgage exception to Section 40-3-13(A). Assuming that the two tracts were community property, the Bank states that the refinancing agreements on both tracts should be treated as purchase-money mortgages, an express exception to the joinder requirement of Section 40-3-13(A) for mortgages affecting community property. The Bank reasons that either each transaction itself created a valid purchase-money mortgage, or the refinancing transactions subrogated the Bank to the purchase-money mortgage position held by Ruidoso State Bank on the large tract, and the Wests on the small one.

[6] A purchase-money mortgage is a mortgage executed at the same time as the deed of the purchase of land, or in pursuance of agreement as part of one continuous transaction, in favor of the vendor, or a third-party lender of the purchase price paid to the vendor, provided the money was loaned for this purpose. *See Davidson v. Click,* 31 N.M. 543, 249 P. 100 (1926); 4 *American Law of Property,* § 16.106E (1952).

[7] [8] Initially, we note that the Bank is correct (despite the trial court finding to the contrary) in stating that the original financing by the Ruidoso State Bank on the large tract created a purchase-money mortgage in favor of the Ruidoso Bank. McDermott granted the mortgage as part of the same transaction in which the vendor executed the deed of purchase transferring title to the property. However, we cannot agree that the refinancing of that obligation creates a second purchase-money mortgage. Title had already passed to McDermott as part of the original financing transaction. McDermott was already indebted for the purchase price. The subsequent borrowing was for the purpose of discharging this debt, not for the acquisition of title.

[9] With reference to the small tract, the Bank also argues that its loan to McDermott allowing him to pay off the real estate contract with the Wests on the small tract created a purchase-money mortgage. Here, the Bank correctly points out that McDermott first acquired legal title to the small tract when the sales contract was paid off. The Bank relies on the treatment of almost the same question in *Liberty Parts Warehouse, Inc. v. Marshall County Bank & Trust,* 459 N.E.2d 738, 739 (Ind.App.1984).

In *Liberty Parts,* the purchaser under a land contract executed a mortgage to secure a loan and used the proceeds to pay off the land contract. The mortgage was deemed to be a purchase-money mortgage having priority over a prior judgment lien against the contract purchaser's interest in the real estate. The court stated that because the proceeds of the bank loan were used to acquire legal title to the real estate, and the deed and mortgage were executed as part of the same transaction, the judgment lien

was junior to the purchase-money mortgage of the bank.

We first point out that the loan from Texas American Bank for $120,000 was far in excess of that needed to pay off the real estate contract. That in itself should suggest problems with treating the mortgage to secure it as a purchase- money mortgage superior to all other liens affecting the property. Notwithstanding this fact, we still cannot agree with the Bank's argument or the conclusions of the *Liberty* court.

[10] [11] In addition to "superior equities," the basis usually given for the priority of a purchase-money mortgage, as recognized by *Liberty Parts,* is that "there is no moment at which the judgment lien can attach to the property before the mortgage of one who advances purchase money." *Id.* at 739. In New Mexico, the purchaser's equitable estate under a land sales contract is an estate in property. *Hobbs Mun. School Dist. No. 16 v. Knowles Dev. Co.,* 94 N.M. 3, 606 P.2d 541 (1980). He is ***507 *296** treated as the owner and his interest in the property is subject to a judgment lien. *Mut. Bldg. & Loan Assoc. of Las Cruces v. Collins,* 85 N.M. 706, 516 P.2d 677 (1973), *overruled on other grounds, Marks v. City of Tucumcari,* 93 N.M. 4, 595 P.2d 1199 (1979). Thus, various liens in fact may attach themselves to property under a land sales contract prior to the execution of a refinancing loan and mortgage. To hold that such a refinancing mortgage was a purchase-money mortgage, entitled to priority over all other liens, would ignore both the earlier attachment of these liens and the possible inequity in subordinating them to the refinancing agreement. We conclude that under New Mexico law a mortgage executed for the purpose of paying off a land sales contract is itself not a purchase-money mortgage.

[12] *Subrogation.* As stated previously, Texas American Bank argues that it has a purchase-money mortgage on both tracts because it was subrogated to the purchase-money mortgage position of the original vendors by virtue of the refinancing transactions. While we do not agree that the real estate contract on the small tract is itself a purchase-money mortgage, for the purposes of this argument we will treat it as such. Having examined the cases relied upon by the Bank, we find that they do not stand for the proposition that a lender who refinances a purchase-money mortgage is entitled, from that circumstance alone, to be subrogated to the rights of the holder of the first mortgage.

In *Simson v. Bilderbeck, Inc.,* 76 N.M. 667, 417 P.2d 803 (1966), Bilderbeck obtained a loan, which Simson signed, securing it with a mortgage on the real property involved. Bilderbeck was experiencing financial difficulties, and before this note became due, the bank asked Simson to pay the note. Simson did so and received from the bank an assignment of the note and mortgage. Simson did not execute a new note and mortgage.

The court ruled that, under NMSA 1953, Repl. Vol. 8 Part 1 (1962), Section 50A-3-415(1), Simson was an accommodation party, and under NMSA 1953, Section 50A-3-415(5), he had a right of recourse on the note against Bilderbeck. *Simson,* 76 N.M. at 669, 417 P.2d at 804. Simson acquired the rights of a transferee by paying the note, under NMSA 1953, Section 50A-3- 603(2), and pursuant to Section 50A-3-201(1), acquired the rights of the transferor bank. *Id.* The court held that, "By the terms of our statutes, the note was not discharged when paid by [Simson], the accommodation maker." *Id.*

The subrogation in *Simson* was based on Simson's status as an accommodation party, and his statutory rights as a transferee after assignment of the mortgage. Texas American Bank is not claiming that it had the status of a transferee. The Bank and McDermott executed a new note and mortgage; there was no assignment of the Ruidoso note and mortgage.

The other New Mexico cases cited by Texas American Bank, *State Farm Mutual Automobile Insurance Co. v. Foundation Reserve Insurance Co.,* 78 N.M. 359, 431 P.2d 737 (1967), and *Fireman's Fund American Insurance Companies v. Phillips, Carter, Reister & Associates, Inc.,* 89

N.M. 7, 546 P.2d 72 (Ct.App.), *cert. denied,* 89 N.M. 5, 546 P.2d 70 (1976), are also unpersuasive on the subrogation issue. These cases actually weaken the Bank's argument. Both of these cases indicate that subrogation is generally not allowed when a third party, in the absence of some compulsion or duty, pays the debt of another. *See State Farm,* 78 N.M. at 363, 431 P.2d at 741; *Fireman's,* 89 N.M. at 9, 546 P.2d at 74.

Texas American Bank has not suggested that it had some legal duty to pay off the initial obligations in question, or that it did so to protect its interests. And, as we have discussed, the Bank received no assignment of the rights under those instruments from either the Ruidoso State Bank or the Wests. In the absence of any of these factors the subrogation argument must fail.

[13] *Loan Extensions.* Texas American Bank argues that the extensions on the real estate note and mortgage given to McDermott by the Bank constitute effective,, ***297 ****508* or new, mortgages on both tracts. These extensions were executed after Dixie McDermott transferred her interest in the property to her husband, and were recorded prior to the time any mechanics' or materialmen's liens were perfected. Once divorced from Dixie McDermott there is no reason why McDermott could not have executed a valid new mortgage on the property.

There are no New Mexico statutes defining the factors essential to create a mortgage. The legislature has approved the use of a concise statutory mortgage form in Section 47-1-44; however, this form does not preclude the use of others. *See* § 47-1-27.

Looking at the September 1984 extension agreements, the import of these extensions is that McDermott wishes to extend the note and carry forward the lien securing the note, and Texas American Bank agrees to do so. The extension agreement states in its final paragraph that the:

extension or rearrangement shall in no manner affect or impair said note or the lien * * * securing the same and that said lien * * * shall not in any manner be waived, the purpose of this instrument being simply to extend or rearrange the time or manner of payment of said note * * * and to carry forward all liens securing the same, which are acknowledged by the Undersigned to be valid and subsisting, and the Undersigned further agrees that all terms and provisions of said original note and of the instrument or instruments creating or fixing the lien or liens securing the same shall be and remain in full force and effect as therein written, except as otherwise expressly provided herein.

The tenor of the instrument indicates that the parties intended to extend the note and "carry forward" the lien. The last paragraph specifically requires that the original lien remains in effect. This instrument does not manifest an intent by the parties to create a *new* lien. The extension agreements do not grant to Texas American Bank a new mortgage on the properties. The agreements merely extend the two original mortgages, void under Section 40- 3-13(A).

[14] *Estoppel.* Texas American Bank makes its estoppel argument only with respect to the large tract. It argues that the Wests are estopped from asserting a lien position superior to Texas American Bank because of the mortgage subordination agreement between them. We first point out that the only finding or conclusion Texas American Bank requested on estoppel was its requested Conclusion of Law No. 3, which was refused:

Briscoe West and Myrl West ("West") are estopped to deny the validity or priority of Bank's mortgages by virtue of their execution of the Mortgage Subordination Agreements submitted as Bank Exhibits 7 and 9, and referred to in Findings numbered 6 and 8 above, and their acceptance of benefits of the proceeds of Bank's loan.

Although submitted as a requested conclusion of law, the request can be understood to be one for a mixed finding of fact and conclusion of law. Other than this request, Texas American Bank requested no findings on the factual elements of estoppel, specifically the element of reliance. *See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.,* 99 N.M. 95, 654 P.2d 548 (1982) (elements of equitable estoppel). Nonetheless, for the purpose of making a worthwhile point on the merits of the

argument, we will treat the estoppel issue as having been raised adequately and preserved for appeal. We infer from the requested conclusion of law that the basis for the estoppel claim is that, by virtue of the subordination agreement and acceptance of benefits, Texas American Bank "relied to its detriment."

[15] [16] This Court has recognized that the party seeking to establish the claim of estoppel must, under all of the circumstances of the case, have the right to rely upon any representations that were made. *La Luz Community Ditch Co. v. Town of Alamogordo,* 34 N.M. 127, 279 P. 72 (1929); *Trujillo v. Gonzales,* 106 N.M. 620, 747 P.2d 915 (1987). Stated differently, the reliance of the party seeking to assert the ***509 *298** doctrine must have been reasonable. *Taxation & Revenue Dep't v. Bien Mur Indian Market,* 108 N.M. 228, 770 P.2d 873 (1989). We cannot say that the Bank had a right to rely on the subordination agreement under the facts of this case. The Bank is charged with knowledge of the law, in this instance the New Mexico community property laws and the joinder statute. *Frkovich v. Petranovich,* 48 N.M. 382, 394, 151 P.2d 337, 345 (1944). The Bank apparently was aware that the property was acquired by McDermott when he was a married man. The Bank does not suggest that the Wests concealed this fact from them or that they were misled as to its significance. For these reasons, any reliance upon the subordination agreement was unfounded, and the Wests are not estopped to deny the validity or priority of the Bank's mortgage.

[17] *After-acquired title.* Finally Texas American Bank asserts that McDermott's after-acquired title, resulting from the special warrant deeds executed by Dixie McDermott, cured the defects in the original mortgages. The answer to this argument is that although other jurisdictions have applied the doctrine of after-acquired title to cure defects in mortgages, the application of the doctrine to documents void at the time of execution for failure to join both spouses has been rejected in New Mexico. *McGrail v. Fields,* 53 N.M. 158, 203 P.2d 1000 (1949); *Jenkins v. Huntsinger,* 46 N.M. 168, 125 P.2d 327 (1942).

For all of the reasons discussed above, we affirm the decision of the district court.

IT IS SO ORDERED.

SOSA, C.J., and BACA, J., concur.

N.M.,1990.

C & L Lumber and Supply, Inc. v. Texas American Bank/Galeria

795 P.2d 502, 110 N.M. 291

END OF DOCUMENT

West Reporter Image (PDF)

EXHIBIT I

Lorenz Co. v Gray, 136 Or 605; 298 P 222 (1931)

Supreme Court of Oregon.
LORENZ CO.
v.
GRAY ET AL.
April 28, 1931.

Department 1.
Appeal from Circuit Court, Klamath County; W. M. Duncan, Judge.
Suit by the Lorenz Company against J. M. Gray, Day & Co., and others, in which defendant last named and certain other defendants filed cross-complaints. From the decree, and from an order on objections to cost and disbursements, defendant Day & Co. and certain other defendants appeal.
Reversed and remanded, with directions.
**223 *607* On February 2, 1928, the plaintiff filed its complaint herein to foreclose an alleged lien of its own and eight other alleged liens alleged to have been assigned to plaintiff, namely, one alleged lien in favor of each of the following lien claimants: Drake Lumber Company, Sixth Street Lumber Company, Sam Bayless, F. R. Olds, Chas. E. Bafford, and Chas. E. Bafford & Son, and two alleged liens in favor of Thomas Philipson.

Originally, this suit was instituted against Da && Co., a corporation, B. A. Kliks, J. M. Gray, Carl Johnson, Edmon Rich, and Laton Stephens. Defendants Day & Co. and B. A. Kliks each filed a demurrer to plaintiff's complaint. These demurrers were overruled.
On April 9, 1929, defendants Edmon Rich and Laton Stephens were stricken as parties defendant, and Dorothy **608* L. Kliks, Fred J. Reif, and Vernon Lindsey, H. E. Christy, and Verner Christy, under the name of Lindsey & Christy, a copartnership, John Ruffing, Mary Telford, and C. A. Pauley were made parties defendant.
Defendant J. M. Gray by his answer seeks to foreclose an alleged lien for labor and material.
Defendant Fred J. Reif asserts a lien because of an attachment, and also because of the filing in Klamath county of a transcript of the judgment rendered in the case wherein the writ of attachment was issued.
An order of default was taken against defendant Carl Johnson. Defendant C. A. Pauley made no appearance. On May 23, 1929, an order was made striking defendant Mary Telford as an unnecessary party.
On September 24, 1929, an order of default was entered of record against defendants C. A. Pauley and Carl Johnson, and the nonsuit theretofore entered as to defendants Mary Telford, Laton Stephens, and Edmon Rich was confirmed.
In the final decree the claim of defendants Lindsey & Christy, a copartnership, was disallowed, and their complaint dismissed. No appeal has been taken by defendants Lindsey & Christy.
Defendant John Ruffing filed no written appearance, but on September 25, 1929, a written stipulation between defendants Ruffing and Dorothy L. Kliks was filed to the effect that defendant Ruffing is not in default and shall be bound in this litigation only to the extent of the ultimate amounts found due and owing the various claimants who are prior in time and right to his judgment lien, and that said stipulation is entered into without knowledge on the part of said Ruffing of any trust agreement of whatsoever nature **609* by which said defendant Dorothy L. Kliks owns and holds title to the lands covered by his (the said Ruffing's) judgment.
Defendant B. A. Kliks seeks to foreclose a mortgage for $10,000 upon the property involved, which mortgage was executed and recorded on September 1, 1928. This defendant denied the validity of all other liens asserted herein except such as are subsequent and subordinate to his alleged mortgage, and alleges that waivers of lien were given by the Sixth Street Lumber Company and J. M. Gray.

Defendant Day & Co. claims that waivers of lien were given as alleged by defendant B. A. Kliks. From a decree entered and from an order upon objections to costs and disbursements, defendants Day & Co., Dorothy L. Kliks, John Ruffing, Fred J. Reif, and B. A. Kliks appeal.

West Headnotes

[1] KeyCite Notes

257 Mechanics' Liens
257II Right to Lien
257II(E) Subcontractors, and Contractors' Workers and Materialmen
257k99.1 k. Contract or Consent of Owner. Most Cited Cases
(Formerly 257k99(2))

Statute requiring lien claimant to mail notice to owner does not apply where material is furnished directly to owner. ORS 87.020.

[2] KeyCite Notes

257 Mechanics' Liens
257XI Enforcement
257k269 Pleading
257k271 Declaration, Bill, Complaint, or Petition
257k271(10) k. Averments as to Completion of Work or Performance of Contract. Most Cited Cases

Complaint seeking to foreclose original contractor's mechanic's lien must allege contract was completed within 60 days or state facts excusing completion. ORS 87.035.

[3] KeyCite Notes

257 Mechanics' Liens
257XI Enforcement
257k269 Pleading
257k271 Declaration, Bill, Complaint, or Petition
257k271(10) k. Averments as to Completion of Work or Performance of Contract. Most Cited Cases

Complaint seeking to foreclose of mechanic's lien of person other than original contractor must allege work was completed, or that claimant ceased to labor or furnish materials within 30 days from filing notice of lien. ORS 87.035.

[4] KeyCite Notes

257 Mechanics' Liens

257XI Enforcement
257k269 Pleading
257k271 Declaration, Bill, Complaint, or Petition
257k271(9) k. Averments as to Time of Furnishing Work or Materials. Most Cited Cases

In suit to foreclose mechanic's lien, complaint alleging materials were furnished between certain dates held insufficient. ORS 87.035.

[5] KeyCite Notes 

257 Mechanics' Liens
257III Proceedings to Perfect
257k133 Form and Contents of Claim or Statement
257k144 k. Statement as to Performance of Contract. Most Cited Cases

Statement in notice of lien claim that claimant ceased to labor and furnish materials on certain date held not allegation of complete performance. ORS 87.035.

[6] KeyCite Notes 

302 Pleading
302X Exhibits
302k310 k. Construction, Operation, and Effect in General. Most Cited Cases

Exhibit to pleading cannot serve purpose of supplying necessary and material averments.

[7] KeyCite Notes 

302 Pleading
302X Exhibits
302k310 k. Construction, Operation, and Effect in General. Most Cited Cases

257 Mechanics' Liens
257XI Enforcement
257k269 Pleading
257k271 Declaration, Bill, Complaint, or Petition
257k271(10) k. Averments as to Completion of Work or Performance of Contract. Most Cited Cases

Complaint seeking to foreclose mechanic's lien held not demurrable on ground completion of contract and date thereof were not stated, in view of allegations of notice of lien attached. ORS 87.035.

[8] KeyCite Notes 

257 Mechanics' Liens

257III Proceedings to Perfect
257k133 Form and Contents of Claim or Statement
257k136 Description of Property
257k136(2) k. Sufficiency in General. Most Cited Cases

Description of property in mechanic's lien claim held fatally defective in not mentioning county or state, whether township was north or south from base line, and not describing building.

[9] KeyCite Notes 

257 Mechanics' Liens
257III Proceedings to Perfect
257k154 Verification of Claim or Statement
257k154(1) k. Necessity. Most Cited Cases

Lien claim, not verified as required by statute, held fatally defective.

[10] KeyCite Notes 

287 Parties
287VI Defects, Objections, and Amendment
287k97 Cure of Defects by Subsequent Proceedings
287k97(1) k. In General. Most Cited Cases

302 Pleading
302XVIII Waiver or Cure of Defects and Objections
302k401 Cure by Subsequent Pleading
302k403 Pleading of Adverse Party
302k403(2) k. Defects in Declaration, Petition, or Complaint in General. Most Cited Cases

Allegations in answer held to cure defect in not naming defendants in complaint seeking foreclosure of mechanic's lien.

[11] KeyCite Notes 

257 Mechanics' Liens
257XI Enforcement
257k269 Pleading
257k277 Issues, Proof, and Variance
257k277(6) k. Variance Between Pleading and Proof. Most Cited Cases

Variance between notice of lien claim describing labor performed as digging ditches, and testimony disclosing alleged carpenter work, held so material as to render notice of lien inadmissible.

[12] KeyCite Notes 

302 Pleading
302XVIII Waiver or Cure of Defects and Objections
302k409 Waiver of Objections to Plea or Answer or Want Thereof
302k409(1) k. In General. Most Cited Cases

Without demurrer on ground answer and cross-complaint of mechanic's lienor did not allege lienor was registered as required by statute, defect was waived. ORS 447.030, 447.050.

[13] KeyCite Notes 

228 Judgment
228XV Lien
228k785 Priorities Between Judgment and Other Liens or Claims
228k785(1) k. In General. Most Cited Cases

257 Mechanics' Liens
257IV Operation and Effect
257IV(C) Priority
257k199 k. Vendors' Liens. Most Cited Cases

Lien of defaulting judgment lien claimant held subordinate to valid liens of other claimants in mechanic's lien foreclosure suit except certain attachment and judgment lien.

[14] KeyCite Notes 

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

To constitute "purchase-money mortgage," money must have been loaned expressly to be used in paying purchase price.

[15] KeyCite Notes 

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k158 k. Priority of Mortgage for Purchase Money. Most Cited Cases

If purchaser indebted to vendor for price borrows from another to discharge debt, giving mortgage therefor, mortgage is not "purchase-money mortgage."
*607 B. A. Kliks, Chas. J. Taff, and C. W. Redding, all of McMinnville (Paul A. Sayre, of Portland, on the brief), for appellants B. A. and Dorothy Kliks and Day & Co.
A. W. Schaupp, of Klamath Falls (Ralph W. Horan, of Klamath Falls, on the brief), for respondent

Lorenz Co.
Rutenic & Yaden, of Klamath Falls, for respondent J. M. Gray and appellant John Ruffing.
Henry E. Perkins, of Klamath Falls, for respondent Fred J. Reif.

**224 *609 KELLY, J. (after stating the facts as above).

[1] Among other things, it is urged by demurrer and oft-repeated objections on the part of defendants Day & Co., B. A. Kliks, and Dorothy L. Kliks as to each cause of suit that the complaint of plaintiff does not state facts sufficient to constitute a cause of suit against said defendants. We are confronted, therefore, with the necessity of determining the sufficiency of these alleged causes of suit. For the purposes of such determination, we must apply the requisites prescribed by statute. The statute prescribes that there must be a notice of delivery to the owner or reputed owner by mail, not later than five days after the first delivery to any contractor or agent of materials for which a lien is to be claimed. Section 51-101, Oregon Code 1930.

*610 This statutory provision has no application when the material is furnished directly to the owner. Beach v. Cooper, 125 Or. 256, 266 P. 633. The giving of such notice is not alleged in the complaint, and the court failed to pass upon plaintiff's application to amend by inserting it; but it is alleged: "That during all of the times hereinafter mentioned Day & Company were and now are the owners of the north half of the northwest quarter, and the southeast quarter of the northwest quarter of section fourteen (14) township thirty-nine (39), south range 9, E. W. M., in Klamath County, Oregon, and the said Day & Company have been during all the times hereinafter mentioned and now are constructing a series of dwelling houses upon said real property through their agent, B. A. Olds."

It is also alleged as to the Drake Lumber Company's claim and the Sixth Street Lumber Company's claim that the materials were furnished and delivered to said defendants at the special instance and request of Day & Co., and, as to the Philipson claims, that the materials were furnished to the said Day & Co.; therefore it was not incumbent upon plaintiff to allege that, within five days after the final delivery, notice thereof was given to said Day & Co.

[2] [3] The statute further prescribes that, in case of an original contractor, notice of claim of lien must be recorded within 60 days after the completion of the contract, and, with respect to all others who furnish material or labor, such notice of claim of lien must be filed for record within 30 days after the completion of the alteration or repair or after the lien claimant has ceased to labor or furnish materials. It is therefore necessary in the case of an original contractor that the *611 complaint should disclose, by appropriate allegation, either that the contract had been completed within the 60 days mentioned, or such state of facts as to excuse the completion thereof. Bernard v. Hassan, 60 Or. 62, 118 P. 201. And, in case of any other person furnishing material or performing labor, the complaint should disclose, by appropriate averment, that the alteration or repair was completed, or that the lien claimant ceased to labor or furnish materials within 30 days from the time of the filing of said notice of lien. Section 51-105, Oregon Code 1930. Neither of these allegations appear in the complaint.

[4] The nearest approach to an allegation that the lien claimant ceased to labor or furnish materials at any definite date is the allegation that between certain dates, which are named, the work was done or the material furnished.

To illustrate why such an allegation is not sufficiently definite, we will refer to the Drake Lumber Company's cause of suit. In respect to that cause of suit, the complaint alleges that the materials were furnished between July 24, and November 14, 1928. The notice of lien states that claimant ceased to furnish materials on the 4th day of November, 1928. Both of these statements may be absolutely true,

but, if the statement in the lien notice in that respect is correct, claimant would not have a valid lien, unless he was an original contractor, because the notice of lien was not filed until December 7, 1928, which is more than 30 days from November 4, 1928. If claimant is an original contractor, it is necessary to allege the completion of the contract within the 60-day period allowed for filing such notice of lien, or such a state of facts as to excuse performance. Bernard v. Hassan, supra.

*612 [5] [6] [7] In the notice of lien of the first-stated claim of Thomas Philipson, it is set forth that claimant ceased to labor and furnish materials under said contract on the 11th day of November, 1928. This is not an allegation of complete performance. In the notice of lien last stated in the complaint, Philipson sets forth that he completed the terms of said contract on or about the 30th day of July, 1928. This, taken with the further statement in the notice of lien, "that 60 days have not elapsed since the date when claimant ceased to labor thereon," bearing in mind that a copy of such notice of lien is attached to the complaint, discloses that this cause of suit is not vulnerable to the contention that the completion of the contract and the date thereof are not stated in the complaint. An exhibit to a pleading cannot serve the purpose of supplying necessary and material averments. Malheur County v. Carter, 52 Or. 616, 621, 98 P. 489. The excerpts just quoted from the above-mentioned exhibit determine the effect thereof and are controlling. Somers v. Hanson, 78 Or. 429, 153 P. 43; Strong et al. v. Moore et al., 118 Or. 649, 655, 245 P. 505, and cases there cited.

[8] As to plaintiff's claim of lien, the description of the property is fatally defective. **225 That part of plaintiff's notice of lien, describing the property, reads as follows:

"Know All Men by These Presents That Lorenz Co., a corporation, hereinafter called 'the claimant,' claims a lien upon the following described property, to- wit:

"All the north half of the northwest quarter (N. 1/2 of N. W. 1/4) of section fourteen (14), township thirty-nine (39) range nine (9) E. W. M., and all buildings and dwelling houses constructed thereon and situated on the above described premises."

*613 It will be noted that in this description neither the county nor the state is mentioned. It will also be noted that the description does not disclose whether the township is north or south from the base line, and that there is no description whatsoever of any building or buildings. These defects are not supplied in any other part of the notice of lien filed by plaintiff.

[9] The statute also prescribes that notice of claim of lien must be verified. This provision of the statute was not observed by lien claimant F. R. Olds, and hence his claim of lien is fatally defective.

[10] For the reasons stated, the court erred in overruling the demurrer to plaintiff's complaint. Defendant B. A. Kliks urges that the defendants are not named in the complaint. This defect was cured by allegations in the answer.

[11] With respect to the lien claim of Chas. E. Bafford, the testimony is too indefinite, vague, and uncertain to render his claim of lien admissible in evidence. In the case of the lien claim of Chas. E. Bafford & Son, the testimony is at variance with the allegations of the notice of lien, in that the notice of lien described the labor alleged to have been performed as digging ditches, whereas the testimony disclosed alleged carpenter work. This is such a material variance as to render the notice of lien inadmissible in evidence.

[12] The claim of J. M. Gray is based upon two items:

"For contract price for labor and materials in plumbing four houses, $850.00.

"For extra work and materials in plumbing four houses, $24.00."

The answer and cross-complaint of this defendant does not allege that he (the said Gray) was

registered *614 in accordance with the provisions of sections 59-1902 and 59-1903, Oregon Code 1930 (1925 Session Laws, c. 272, p. 486).

Section 59-1905, Oregon Code, 1930, provides that "no person, firm or corporation carrying on, conducting or transacting business as aforesaid shall, after this act takes effect, be entitled to maintain any suit or action in any of the courts of this state without alleging and proving that such person or persons have been duly registered at the time of performing such work," etc.

No demurrer was interposed to this answer, and, applying the rule announced in cases wherein the filing of a certificate of assumed name is in question, it may be said that this objection was waived. Beamish v. Noon, 76 Or. 415, 149 P. 522; Schucking v. Young, 78 Or. 483, 153 P. 803; Benson v. Johnson, 85 Or. 677, 165 P. 1001, 167 P. 1014; Columbia River Door Co. v. Todd, 90 Or. 147, 175 P. 443, 860; Uhlmann v. Kin Daw, 97 Or. 681, 193 P. 435.

[13] Defendant Reif asserts an attachment and judgment lien admittedly subordinate and subsequent to all other liens urged in this suit. In his cross- complaint defendant Reif does not allege facts disclosing that the judgment lien of the defendant Ruffing was subsequent and subordinate to the lien of Reif. Defendant Ruffing made default, and nowhere in the record does it affirmatively appear how much is involved in Ruffing's lien nor when it attached to the property.

In this state of the record Ruffing's lien should be held to be subsequent and subordinate to the valid liens of all the parties defendant herein except that of defendant Reif: and the decree should have affirmatively declared that the recognition of Reif's lien, as a valid *615 and subsisting lien upon the property involved herein, is without prejudice to the right of defendant Ruffing to enforce his lien in any manner authorized by law. Oregon Lumber & Fuel Co. v. Hall, 76 Or. 138, 148 P. 61. Moreover, because of the stipulattion between said defendants Ruffing and Dorothy L. Kliks, the legal title held by said Dorothy L. Kliks to said premises should be declared to be subject to said judgment of defendant Ruffing.

[14] [15] Defendant B. A. Kliks contends that his mortgage is a purchase- money mortgage. We cannot concur in this contention. To constitute a purchase- money mortgage, the money must have been loaned with the express purpose and intention that it should be used in paying the purchase price of the land. If the purchaser of land is already indebted to the vendor for the price of the same, and then borrows money from a third person for the purpose of discharging this debt, and gives the latter a mortgage on the land, this mortgage is not entitled to the standing of a purchase-money mortgage. As we understand the record in this case, Day & Co. was indebted to the West Coast National Bank upon a contract to purchase the property in question. Defendant B. A. Kliks loaned Day & Co. $10,000 to pay its indebtedness. There is no testimony in the record to the effect that, when the contract to purchase was executed by Day & Co., a purchase-money mortgage was within the contemplation **226 of the parties. Paget v. Peters, 133 Or. 608, 286 P. 983, 289 P. 1119. We find nothing in the record to support the contention that the mortgage of B. A. Kliks has been paid or was merged in the deed to Dorothy L. Kliks. As to the alleged waivers of liens, the record discloses that the same were without consideration.

*616 The statute prescribes that the land upon which any building or other improvement shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the circuit court at the time of the foreclosure of such lien), shall also be subject to the liens created by such statute.

The record discloses testimony of one witness that one acre of land is necessary for the convenient use of each building in suit. Another witness testified that five acres are necessary, but nowhere in the record is there such a description with reference to the respective sites of the buildings, either by metes and bounds or otherwise, as to enable the circuit court or this court to decree the sale on foreclosure of the specific plot of ground necessary for the convenient use of each building

respectively. We would suggest that these descriptions be supplied in order that certainty may be assured.

This cause is reversed and remanded for such further proceedings as may be proper not inconsistent herewith. It is further ordered that defendants B. A. Kliks and John Ruffing, respectively, be decreed to be entitled to liens upon the property in suit for their respective costs and disbursments upon appeal, said liens for costs and disbursements on appeal to have the same respective priorities in respect to the other liens thereon that the mortgage and judgment liens, respectively, of said Kliks and Ruffing shall have upon final determination of this suit. It is further ordered that no other party hereto shall be awarded costs or disbursements upon this appeal.

BEAN, C. J., and RAND and ROSSMAN, JJ., concur.

Or. 1931.

LORENZ CO. v. GRAY ET AL.

298 P. 222, 136 Or. 605

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